CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 170.

MASON CITY AND FORT DODGE RAILROAD COMPANY

vs.

C. D. BOYNTON.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED DECEMBER 21, 1905.

(20,021.)

(20,021.)

SUPREME COURT OF THE UNITED STATES.

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INDEX.

	Original.	Print.
Cirtificate from the United States circuit court of appeals for the eighth circuit	1	1
Statement of the case	1	1
Questions certified	5	3
Judges' certificate	6	4
Clerk's certificate	7	4

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 23, 1906.

1 United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1905.

No. 2172.

MASON CITY & FORT DODGE RAILROAD COMPANY, Plaintiff in Error,
v.
C. D. BOYNTON, Defendant in Error.

In Error to the Circuit Court of the United States for the Southern District of Iowa.

The United States Circuit Court of Appeals for the Eighth Circuit, sitting at the City of St. Louis, Missouri, on the 8th day of December, A. D. 1905, certifies that the record on file in the above entitled cause, which is pending in such court upon a writ of error duly issued to review a judgment rendered in such cause in favor of the defendant in error in the Circuit Court of the United States for the Southern District of Iowa, discloses the following:

The Code of Iowa, 1897, in a chapter relating to the taking of private property for works of internal improvement, including the construction and repair of railways, contains the following:

"SEC. 1999. If the owner of any real estate necessary to be taken for either of the purposes mentioned in this chapter refuses to grant the right of way or other necessary interest in said real estate required for such purposes, or if the owner and the corporation cannot agree upon the compensation to be paid for the same, the sheriff of the county in which such real estate may be situated shall, upon written application of either party, appoint six freeholders of said county not interested in the same or a like question, who shall

2 inspect said real estate, and assess the damages which said owner will sustain by the appropriation of his land for the use of said corporation, and make report in writing to the sheriff of said county; and, if the corporation shall, at any time before it enters upon said real estate for the purpose of constructing said railway, pay to the sheriff, for the use of the owner, the sum so assessed and returned to him as aforesaid, it may construct and maintain its railway over and across such premises."

"SEC. 2009. Either party may appeal from such assessment to the District Court within thirty days after the assessment is made, by giving the adverse party, or, if such party is the corporation, its agent or attorney, and the sheriff notice in writing that such appeal has been taken. The sheriff shall thereupon file a certified copy of so much of the appraisement as applies to the part appealed from, and said court shall try the same as in an action by ordinary proceedings. The land owner shall be plaintiff and the corporation defendant."

"SEC. 2010. An appeal shall not delay the prosecution of work upon said railway, if said corporation pays or deposits with the sheriff the amount assessed. The sheriff shall not pay such deposit over to the person entitled thereto after the service of notice of appeal, but shall retain the same until the determination thereof. * * *"

"SEC. 2011. On the trial of the appeal no judgment shall be rendered except for costs. The amount of damages shall be ascertained and entered of record, and if no money has been paid or deposited with the sheriff, the corporation shall pay the amount so ascertained, or deposit the same with the sheriff before entering upon the premises. Should the corporation decline to take the property and pay the damages awarded on final determination of the appeal, then it shall pay, in addition to the costs and damages actually suffered by the land owner, a reasonable attorney's fees, to be taxed by the court."

"SEC. 2012. If, on the trial of the appeal, the damages awarded by the commissioners are increased, the corporation shall pay or deposit with the sheriff the whole amount of damages awarded before entering on, or using or controlling the premises. The sheriff, upon being furnished with a certified copy of the assessment may remove said corporation, and all persons acting for or under it, from said premises, unless the amount of the assessment is forthwith paid or deposited with him."

"SEC. 2013. If the amount awarded by the commissioners is decreased on the trial of the appeal, the reduced amount only shall be paid the land owners."

Section 3497 of the Code of Iowa, 1897, also provides:

"An action may be brought against any railroad corporation, * * * in any county through which such road or line passes or is operated."

3 The Mason City and Fort Dodge Railroad Company, plaintiff in error, hereinafter called railroad company, was a railroad corporation organized and existing under the laws of the State of Iowa, and as such entitled to avail itself of the provisions of the foregoing statutes of Iowa. C. D. Boynton, defendant in error, hereinafter called the owner, was the owner of certain lots of ground in the Town of Carroll, Carroll County, in the State of Iowa, and was at all times mentioned herein a citizen of the State of Missouri. Prior to February 18, 1902, the railroad company, requiring Boynton's lots as a right of way for the construction of its railroad, filed an application in the office of the sheriff of Carroll County, asking for the appointment of six freeholders to inspect the lots and assess the damages which the owner would sustain by the appropriation of his lots for the use of the railroad company. On February 18, 1902, the commissioners were duly appointed by the sheriff and made their report, assessing the owner's damages occasioned by the appropriation of his lots by the railroad company at $4750.00.

On the same day the railroad company paid the sheriff that amount of money for the use of the owner.

Afterwards, and within the time fixed by the State statute, the owner appealed from the commissioners' award to the District court of Carroll County. In due time, the owner filed in the last mentioned court a petition for the removal of the cause into the Circuit Court of the United States for the Western Division of the Southern District of Iowa, on the ground of diversity in citizenship. In his petition and bond to secure such removal the owner referred to and

treated himself as the defendant, and referred to and treated the railroad company as the plaintiff, in the case.

In due course the cause came on for hearing in the Circuit Court, when the parties, by a written stipulation filed with the clerk,
4 waived a jury and agreed to try the case to the court. Both parties introduced evidence and fully submitted themselves to the jurisdiction of the court (if they could do so). The trial resulted in an assessment of the owner's damages at $11.445, and in a judgment against the railroad company for costs, including a fee of $300 for the owner's attorneys. In due time the railroad company regularly sued out a writ of error to the end that the record and proceedings in the Circuit Court might be reviewed by this court. The assignment of errors which accompanied the petition for the writ of error alleged that the circuit court erred in ascertaining and fixing the amount of damages to be paid by the railroad company for its appropriation of the owner's lots, in that there was an entire absence of evidence to support the award and finding. At no time during the pendency of the proceedings in the Circuit Court did the railroad company question the jurisdiction of that court or the right of the owner to remove the cause into that court, but both parties participated in the trial up to a final judgment, and in the proceeding to secure a writ of error, as if there was no question of jurisdiction in the case. Not until the railroad company filed its brief in this court was the jurisdiction of the Circuit Court in any manner challenged. But in its brief, as also in the oral argument made in its behalf, the chief point relied upon by the railroad company to secure a reversal of the finding and judgment of the Circuit Court, is that the owner was the plaintiff in said cause and proceeding, and did not have the right to remove the same into the circuit court and that therefore that court could not entertain jurisdiction thereof.

5 And the Circuit Court of Appeals for the Eighth Circuit further certifies that the following questions of law are presented in this cause, that their decision is indispensable to a decision of the cause, and that to the end that such court may properly decide the issues of law so presented it desires the instruction of the Supreme Court of the United States upon such questions, to wit:

1. Was the land owner a defendant, within the meaning of the removal statute, when the suit was removed into the Circuit Court?

2. If the land owner was not a defendant, within the meaning of the removal statute, could the Circuit Court take cognizance of the suit through a removal by him? Stated in other words, the question is this: Is the provision of the removal statute, to the effect that the removal, on the ground of diverse citizenship, may be "by the defendant or defendants therein, being non-residents of that State," restrictive and jurisdictional in the sense that cognizance of the suit can be taken by the Circuit Court through a removal only when it is by the defendant, or is the provision only modal and formal in the sense that non-compliance therewith, or non-conformity thereto, may be waived?

3. Is the judicial proceeding which the land owner is authorized by the statutes of Iowa to initiate in the District Court of the State, by way of a so-called appeal from the assessment of the commis-

sioners selected by the sheriff, a suit which can be originally instituted in the Circuit Court of the United States, when the citizenship of the parties and the sum or value of the matter in dispute are such as to make the suit otherwise cognizable in that court?

6 4. If the Circuit Court could not have taken cognizance of the suit through the removal by the land owner, and if the Circuit Court could have taken cognizance of the suit through its original institution in that court after the assessment by the commissioners, did the parties by appearing in the Circuit Court and there litigating to a final conclusion the matter in dispute, without any objection to the jurisdiction of the court or to the manner in which its jurisdiction was invoked, authorize the Circuit Court to exercise jurisdiction and to proceed to final judgment in like manner and with like effect as if the suit had been originally instituted in that court, the citizenship of the parties and the sum or value of the matter in dispute being such as to make the suit otherwise cognizable in that court?

WILLIS VAN DEVANTER,
WILLIAM C. HOOK,
ELMER B. ADAMS,
Judges of the United States Circuit Court of Appeals for the Eighth Circuit.

Filed Dec. 8, 1905.
JOHN D. JORDAN, *Clerk.*

7 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing certificate in the case of Mason City & Fort Dodge Railroad Company, Plaintiff in Error, *v.* C. D. Boynton, No. 2172, December Term, 1905, was duly filed and entered of record in my office by order of said Court, and as directed by said Court, the said certificate is by me transmitted to the Supreme Court of the United States for its action thereon.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the said United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, this eighth day of December, A. D. 1905.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

8 [Endorsed:] U. S. Circuit Court of Appeals, Eighth Circuit. December Term, 1905. No. 2172. Mason City and Fort Dodge Railroad Company, Plaintiff in Error, *vs.* C. D. Boynton. Certificate of Questions to Supreme Court of the United States.

Endorsed on cover: File No. 20,021. U. S. circuit court appeals, 8th circuit. Term No. 170. Mason City & Fort Dodge Railroad Company *vs.* C. D. Boynton. (Certificate.) Filed December 21st, 1905. File No. 20,021.

FILE COPY.

Office Supreme Court U. S.
FILED
OCT 8 1906
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906

No. 170

MASON CITY AND FORT DODGE RAILROAD COMPANY

us.

C. D. BOYNTON

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

MOTION AND APPLICATION TO HAVE THE WHOLE RECORD SENT TO THE SUPREME COURT FROM THE CIRCUIT COURT OF APPEALS.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906

No. 170

MASON CITY AND FORT DODGE RAILROAD COMPANY

us.

C. D. BOYNTON

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

MOTION AND APPLICATION TO HAVE THE WHOLE RECORD SENT TO THE SUPREME COURT FROM THE CIRCUIT COURT OF APPEALS.

Comes now the Mason City and Fort Dodge Railroad Company, Plaintiff in Error, and moves this court that the whole record and cause in the above entitled cause be sent to this court for its consideration, and this Plaintiff in Error tenders to this court a duly certified copy of the whole record and cause, which record is certified by John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit. Said record so certified is identified and made part of this motion and marked respectively, Exhibits "A" and "B."

Said Plaintiff in Error prays that this motion be granted for the following reasons:

1st. The questions involved relate to the jurisdiction of the Federal Courts on a petition to remove to the Federal Court from the State Court; the four questions submitted by the Circuit Court of Appeals as set forth on pages 3 and 4 of the certificate involve and determine jurisdictional questions only.

2nd. It is desirable under decisions of this court and the acts of congress that questions affecting the jnrisdiction of the Federal Courts, on removal to such courts of suits from the State Courts, shall be decided by the Supreme Court rather than by the Circuit Court of Appeals; such questions owing to their gravity and importance demand a determination by this tribunal of last resort.

3rd. The entire record as tendered with this motion is not voluminous. This cause if determined by this court on the entire record requires no greater search or examination of the record than an examination of the certificate furnished by the Circuit Court of Appeals will require.

4th. The first question submitted by the certificate of the Circuit Court of Appeals (page 3) is:

"Was the land owner the defendant within the meaning of the removal statute when the suit was removed into the Circuit Court?"

This question involves the consideration of the Iowa statutes and the issues actually in the case at the time of its transfer to the Federal Court; a consideration of the entire record will enable this court to better determine this jurisdictional question than if this court is deprived of the use of the said record.

5th. The record in this cause as shown on page 3 of the printed record certified by the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit contains the written complaint filed by the Defendant in Error in the United States Circuit Court, which tried the case; the said complaint contained this language: "And plaintiffs pray that this court and a jury in it investigate the question of what sum is justly due as compensation in the premises and make a finding accordingly." No reference or mention is made of this complaint in the findings and certificate made by the Circuit Court of Appeals to this court; a proper determination of whether the railroad company is defendant or is plaintiff in an action by the railroad company for the condemnation of private property under the Iowa statute requires the consideration of the fact that nothing was involved on the trial save the amount of damages, for the title to the property had passed to the railroad company and the right to condemn the property for such purposes was not in issue.

A. G. BRIGGS,
JOHN L. ERDALL,
M. F. HEALY,
THOS. D. HEALY,
ROBERT HEALY,
D. M. KELLEHER,

Counsel for Mason City and Fort Dodge Railroad Co., Plaintiff in Error.

FILE COPY.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 173

MASON CITY AND FORT DODGE RAILROAD COMPANY

vs.

E. D. BOYNTON

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF AND ARGUMENT FOR MASON CITY AND FORT DODGE RAILROAD COMPANY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906

No. 170

MASON CITY AND FORT DODGE RAILROAD COMPANY

vs.

C. D. BOYNTON

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE EIGHTH CIRCUIT

BRIEF AND ARGUMENT FOR MASON CITY AND FORT DODGE RAILROAD COMPANY

A. G. BRIGGS, St. Paul, Minnesota
JOHN L. ERDALL, St. Paul, Minnesota
M. F. HEALY, Fort Dodge, Iowa
THOS. D. HEALY, Fort Dodge, Iowa
ROBERT HEALY, Fort Dodge, Iowa

ATTORNEYS FOR MASON CITY AND FORT DODGE RAILROAD COMPANY.

STATEMENT OF FACTS.

This case comes on a certificate from the Circuit Court of Appeals for the Eight Circuit. Upon a statement of the facts the following questions of law are presented to the Supreme Court.

1. Was the land owner a defendant, within the meaning of the Removal Statute, when the suit was removed into the Circuit Court?

2. If the land owner was not a defendant, within the meaning of the removal statute, could the Circuit Court take cognizance of the suit through a removal by him? Stated in other words, the question is this: Is the provision of the removal statute, to the effect that the removal, on the ground of diverse citizenship, may be "by the defendant or defendants therein, non-residents of that State," restrictive and jurisdictional in the sense that cognizance of the suit can be taken by the Circuit Court through a removal only when it is by the defendant, or is the provision only model and formal in the sense that non-compliance therewith, or non-conformity thereto, may be waived?

3. Is the judicial proceeding which the land owner is authorized by the statutes of Iowa to initiate in the District Court of the State, by way of a so-called appeal from the assessment of the commissioners by the sheriff, a suit which can be originally instituted in the Circuit Court of the United States, when the citizenship of the parties and the sum or value of the matter in dispute are such as to make the suit otherwise cognizable in that court?

4. If the Circuit Court could not have taken cognizance of the suit through the removal by the land owner, and if the Circuit Court could have taken cognizance of the suit through its original institution in that court after the assessment by the commissioners, did the parties by appearing in the Circuit Court and there litigating to a final conclusion the matter in dispute, without any objection to the jurisdiction of

the court or to the manner in which its jurisdiction was invoked, authorize the Circuit Court to exercise jurisdiction and to proceed to final judgment in like manner and with like effect as if the suit had been originally instituted in that court, the citizenship of the parties and the sum or value of the matter in dispute being such as to make the suit otherwise cognizable in that court?

POINTS.

I.

THE LAND OWNER WAS PLAINTIFF WITHIN THE MEANING OF THE REMOVAL STATUTE, WHEN THE SUIT WAS REMOVED INTO THE CIRCUIT COURT.

The corporation seeking to condemn real estate is in fact the defendant, and occupies a position analagous to that of a defendant in a case brought to recover the value of real estate which has been appropriated. This is the case where there is nothing left to contest but the value of the real estate taken.

Mississippi & Rum River Boom company vs. Patterson, 98, *U. S.*, 403.

This is a leading case on this question.

When a case is transferred to the District Court by appealing from the award of the commissioners, it took under the statutes of the state, the form of a suit at law, and was thenceforth subject to its ordinary rules and incidents. No other question was open to contest in the State District Court.

Turner vs. Holeran, 11 *Minnesota*, 253.

Mississippi & Rum River Boom Company vs. Patterson 98, *U. S.*, 403.

Meyers et al, vs. C. & N. W. et al, 118 *Iowa*, 312.

Sections 1999, 2009, 2010, 2011 of the Code of Iowa, (1897), set forth on pages 1 and 2 of the certificate.

This is the rule in condemnation proceedings under the Iowa statutes and the Supreme Court of Iowa holds that the condemning corporation on the trial in the State Court is in fact the defendant.

Myers et al, vs. C. & N. W. Ry. Co., 118 *Iowa*, 312.

See sections 1999, 2009, 2010, 2011 of the Code of Iowa (1897) set forth in the certificate, pages 1 and 2.

The Iowa Supreme Court cites in support of this conclusion the following cases:

Boom Company vs. Patterson, 98, *U. S.*, 403; 28 *L. Ed.* 207.
Railroad Co. vs. Myers, 115, *U. S.* 1; 29 *L. Ed.* 319.
Searle vs. School District, 124, *U. S.* 197.
Ragatz vs. City of Dubuque, 4 *Iowa*, 343.
Sigafoos vs. Tolbert, 25 *Iowa*, 214.

The case of Kirby vs. C. & N. W. Ry. Co., decided by District Judge McPherson, 106 Fed. Rep. 552, involved the same condemnation proceedings passed on by the Iowa Supreme Court in Myers vs. Railroad company, 118 Iowa, 315, and the decision in the case of Kirby vs. C. & N. W. Ry. Co. is in accord with the decision of the Iowa Supeme Court.

In support of the above point we also, cite
Chicago K & W. Ry. Co. vs. Butts, 55 *Kansas* 660.
Railroad Company vs. Owen, 8 *Kan.* 274.
Railway Company vs. Orr., 8 *Kan.* 289.
Risner vs. Strong, 24 *Kan.* 297.

The cases of Union Terminal Ry. Co., vs. C. B. & Q. Ry. Co., 119 Fed. Rep. 209; Madisonville Traction Co., vs. St. Bernard Mining Co. 130 Fed. Rep. 790; The Colorado Eastern R. R. Co. vs. C. B. & Q. Ry. 141 Fed. Rep. 898, and Madisonville Traction Co., vs. St. Bernard Mining Co., 196 U. S. 250, are not in conflict with our contention, or with the decisions above cited.

II.

THE FEDERAL COURT WILL RESPECT A CONSTRUCTION PLACED ON THE CONDEMNATION STATUTES BY THE STATE SUPREME COURT. IT BECOMES A RULE OF PROPERTY.

Madisonville Traction Co. vs. St. Bernard Mining Co. 196 *U. S.* 250.

Mississippi & Rum River Boom Co. vs. Patterson, 98 *U. S.* 403.
Leffingwell vs. Warren, 67 *U. S.* 599.
Bucher vs. Cheshire R. R. Co. 125 *U. S.* 555.
West River Bridge Co. vs. Dix. 6 *How.* 507.
Long Island Water Supply Co. vs. Brooklyn 166 *U. S.* 685.
Lowndes vs. Board, etc., 153 *U. S.* 1.
Bondurant vs. Watson, 103 *U. S.* 281.
Burgess vs. Seligman, 107 *U. S.* 20-33.
Gage vs. Pompelly, 115 *U. S.* 454.
Hardin vs. Jordan, 14 *U. S.* 371-382-402.
Union Bank vs. City of Memphis, 189, *U. S.* 71.
United States vs. Morrison, 4 *Pet.* 124.
Green vs. Neal's Lessee, 6 *Pet.* 291.
United States vs. Freeman, 113 *Fed. Rep.* 370-322.

III.

THE CIRCUIT COURT CANNOT TAKE COGNIZANCE OF A SUIT THROUGH A REMOVAL BY ANYONE SAVE "THE DEFENDANT OR DEFENDANTS THEREIN, BEING NON-RESIDENTS OF THE STATE." A FAILURE TO SO REMOVE IS A TRULY JURISDICTIONAL DEFECT

Martin et al vs. Snyder, et al, 148 *U. S.* 663.
Fife vs. Whitel, 102 *Fed. Rep.* 537.
Torrence vs. Shedd, 144 *U. S.* 527.
Ayres vs. Watson, 113 *U. S.* 594.
Martin vs. Baltimore & Ohio R. R. 151 *U. S.* 673.
Hanrick vs. Hanrick, 153 *U. S.* 192.
Fisk vs. Henarie, 142 *U. S.* 459.
In re Pa. 137 *U. S.* 451.
Blacks Dillion on Removal of Causes, Sec. 65.
Telegraph Co. vs. Brown, 32 *Fed Rep.* 337.
Anderson vs. Appleton, 32 *Fed. Rep*, 855.
Weller vs. Tobacco Co. 32 *Fed. Rep.* 860.

IV.

THERE CAN BE NO WAIVER OF A DEFECT IN THE JURISDICTION OF THE CIRCUIT COURT IF THE REMOVAL IS NOT MADE BY THE DEFENDANT AS REQUIRED BY SECTION 2 OF THE REMOVAL ACT.

Martin et al vs. Snyder et al 148 *U. S.* 663.
Graves vs. Corbin, 132 *U. S.* 571-592.
Stevens vs. Nichols, 130 *U. S.* 230.
Crehore vs. Ohio, etc., 131 *U. S.* 240.
Jackson vs. Allen, 132 *U. S.* 27.
Mansfield C. & L. M. R. Co. vs. Swan, 111 *U. S.* 379.
United States vs. Huckabee, 16 *Wall* 414.
Thompson vs. Railroad Co. 6 *Wall* 134.
Martin vs. Baltimore & Ohio R. R. Co. 151 *U. S.* 690.
Ayres vs. Watson, 113 *U. S.* 594.
Sec. 65 *Blacks Dillons Removal of Causes.*
Minnesota vs. Northern Securities Co. 194 *U. S.* 48.

The true question is not what either of the parties may be allowed to do, but whether the court will affirm or reverse a judgment of the Circuit Court when it appears that it is a case to which the judicial power of the United States does not exist.

Dissenting opinion of Justice Curtis, Dred Scott Case 19 How. 393.

Jurisdiction will not be required unless the removal is made by the party described; it is this which effectuates jurisdiction.

See Turner vs. Bank of North America, 4 *Dall.* 8.

V.

THE JUDICIAL PROCEEDING WHICH THE LAND OWNER IS AUTHORIZED BY THE STAT-

UTES OF IOWA TO INITIATE IN THE DISTRICT COURT OF THE STATE BY APPEALING FROM THE ASSESSMENT OF THE COMMISSIONERS SELECTED BY THE SHERIFF, IS A PROCEEDING WHICH COULD BE ORIGINALLY INSTITUTED IN THE CIRCUIT COURT OF THE UNITED STATES WITHIN THE MEANING OF THE REMOVAL ACT.

Madisonville Traction Co. vs. St. Bernard Mining Co., 196 *U. S.* 239.

Mississippi & Rum River Boom Co. vs. Patterson, 98 *U. S.* 403.

VI.

THE MASON CITY & FT. DODGE RAILROAD COMPANY BY APPEARING IN THE CIRCUIT COURT WITHOUT OBJECTING TO THE JURISDICTION OF THE CIRCUIT COURT DID NOT AND *COULD NOT GIVE THE CIRCUIT COURT JURIS-*DICTION TO RENDER JUDGMENT, IF THE CASE WAS REMOVED THERE UNDER THE PROVISIONS OF THE REMOVAL STATUTE.

If Boynton, the non-resident land owner, was the plaintiff, he could not transfer the cause from the State District Court to the Federal Circuit Court, and his case was one within the class that could not be transferred.

Martin vs. Snyder, 148 *U. S.* 662, *is necessarily decisive of this question.*

Parkinson vs. Barr, 105 *Fed. Rep.* 81-83. *Opinion by District Judge Hawley.*

Thurber vs. Miller 14 *C. C. A.* 432.

Federal Circuit Courts have no jurisdiction save that specifically conferred by statute.

U. S. vs. Hudson, 7 *Cranch*, 32.

Sheldon vs. Zill 8 *How.* 441.

It was for congress to say how much of the judicial

power of the United States shall be exercised by the subordinate courts it may establish from time to time.

Plaquemines Tropical Fruit Co. vs Henderson, 170 *U. S.* 511.

Turner vs. Bank of North America, 4 *Dall.* 8.

VII.

THERE IS NO ELEMENT OF ESTOPPEL AGAINST THE MASON CITY & FT. DODGE RAILROAD COMPANY WHICH PREVENTS IT FROM INSISTING THAT THE CIRCUIT COURT WAS WITHOUT JURISDICTION ON REMOVAL BY BOYNTON.

The acts of a party sought to be made the basis for an estoppel must be viewed in the light of the understanding he had of his rights, and not in the light of such rights as they may thereafter be determined.

City of Cleveland vs. Cleveland & R Co., 93 *Fed. Rep.* 113-125-131. Opinion by District Judge.

A party asserting estoppel must affirmatively show that he acted in reliance upon the act or declarations of the other party.

Malloney vs. Horen, 49 *N .Y.* 11.

Seekles vs. Norman, 71 *Iowa*, 265-267.

Blodgett vs. Penn., 97 *Mo.* 263.

Barney vs. Wheeler, 128 *Mo.* 84.

It is necessary that the party asserting estoppel should be without other knowledge of the facts, or means of acquiring such knowledge.

Smith vs. Trammel, 68 *Iowa*, 488-490.

Fischer vs. Johnson, 106 *Iowa*, 181-187.

Hel. vs. Epperly, 31 *Pa.* 334.

Phil. & W. B. R. R. Co. vs. Du Bois, 79 *U S.* 47.

There can be no estoppel where both parties have the same means of ascertaining the truth.

Branson vs. Wirth, 17 *Wall.* 33.

VIII.

THE ADJUDICATIONS IN WHICH ONE IS HELD ESTOPPED FROM DENYING THE JURISDICTION OF THE FEDERAL COURT, ARE THOSE IN WHICH THE PARTY WHO DENIES THE JURISDICTION INVOKED THE ACTION OF THE FEDERAL COURT, AND RELATE TO CASES IN WHICH THE DEFECTS ARE NOT TRULY JURISDICTIONAL AS DEFINED IN SECTION TWO OF THE REMOVAL ACT OF 1887-88.

Baggs vs. Martin, 179, *U. S.* 205.
Giles vs. Harris, 189 *U. S.* 475.
Ficher vs. Shropshire, 147 *U. S.*, 133.
Cowley vs. Northern Pacific, Ry. 159 *U. S.* 569.
Blythe vs. Huckabee, 173 *U. S.* 501-506.
Huntington vs. Laidley, 176 *U. S.* 666.

ARGUMENT

I

THE LAND OWNER WAS PLAINTIFF WITHIN THE MEANING OF THE REMOVAL STATUTE WHEN THE SUIT WAS REMOVED INTO THE CIRCUIT COURT.

FIRST QUESTION

The first question certified by the Circuit Court (Certificate page 3) is, "Was the land owner a defendant within the meaning of the removal statute when the suit was removed into the Circuit Court?"

The Mason City & Fort Dodge Railroad Company was a railroad corporation organized and existing under the laws of the state of Iowa.

C. D. Boynton, was the owner of certain lots in the town of Carroll, Carroll county, State of Iowa, and was at all times mentioned a citizen of the state of Missouri.

Prior to February 18, 1902, the railroad company requiring Boynton's lots as a right of way for the construction

of its railroad, filed an application in the office of the sheriff of Carroll county, Iowa, asking for the appointment of six free holders to inspect the lots and assess the damages which the owner would sustain by the appropriation of his lots for the use of the railroad company.

On February 18, 1902, the commissioners were duly appointed by the sheriff and made their report, assessing the owner's damages occasioned by the appropriation of his lots by the railroad company at $4,750.00.

On February 18, 1902, the same day that the assessment was made by the sheriff's commissioners, the railroad company paid the sheriff the amount of such assessment for the use of the owner, and went into actual possession and occupancey of the property condemned.

Afterwards, and within the time fixed by the state statute, the owner appealed from the commissioners' award to the District Court of Carroll county. Subsequently on his application the cause was removed to the Federal Circuit Court in which court a jury was waived by both parties and a judgment approximating $12,000, was rendered against the railroad company.

It is our claim that the land owner is in fact the plaintiff and that the railroad company is in fact the defendant.

We may well regard the case of

The Mississippi & Rum River Boom Company vs. Patterson, 98 *U. S.* 403.

a leading case on this question.

The plaintiff in error was a corporation created under the laws of Minnesota, and defendant was a citizen of the State of Illinois. Condemnation proceedings were instituted under the laws of the State of Minnesota to appropriate Patterson's land for boom purposes; the provisions of the Minnesota statute are referred to in the opinion of Mr. Justice Field, and are similar to the Iowa statute.

Both the Boom company and the land owner appealed

from the award made by the commissioners appointed to appraise the land, which commission was a non-judicial body.

This court held that the case was one removable under the Act of March 3, 1875, which provides "that any suit of a civil nature at law or in equity, pending or brought in a State court in which there is a controversy between citizens of different states, may be removed by *either party* into the Circuit Court of the United States for the proper district." We quote the following from the opinion of the Court:

"The proceedings in the present case before the commissioners appointed to appraise the land, was in the nature of an inquest to ascertain its value, and not a suit at law in the sense of those terms, but when it was transferred to the District Court by appeal from the award of the commissioners, it took under the statute of the state, the form of a suit at law and was forwith subject to its ordinary rules and incidents. *The point in issue was the compensation to be made to the owner of the land; in other words the value of the property taken; no nother question was open to contestation in the District Court.*

Turner vs. Holeran, 11 *Minn.*, 253."

And again,

"The case would have been in no essential particular different had the state authorized the company by statute to appropriate the particular property in question and the owners to bring suit against the company in the courts of law for its value.

That a suit of that kind could be transferred from the State to the Federal Court, if the controversy were between the company and citizen of another state, cannot be doubted, and we perceive no reason against the transfer of the pending case, that might not be offered against the transfer of the case supposed."

In this case the particular question as to whether the land owner was plaintiff or the condemning corporation was defendant was not directly discussed by the court, but we submit that the language of the court in determining the

character of the proceedings in the State Court leaves no question, but what the land owner was in truth the plaintiff. It could not be otherwise if the case "would have been in no essential particular different had the state authorized the company by statute to appropriate the particular property in question and the owners to bring suit against the company in the courts of law for its value."

The title to the property of Boynton in fact passed to the railroad company before the case was brought on appeal to the Iowa District Court, if the compensation fixed by the commissioners was paid before the case was brought into the District Court on appeal. The certificate shows the compensation was paid.

Section 1999 of the Iowa Code provides....."If the corporation shall at any time before it enters upon said real estate for the purpose of constructing said railway, pay to the sheriff for the use of the owner, the sum so assessed and returned to him as aforesaid, it may construct and maintain its railway over and across such premises."

Section 2010 provides, "An appeal shall not delay the prosecution of work upon said railway, if said corporation pays by deposit with the sheriff, the amount assessed."

This very question now presented to this court, came before the Supreme Court of Iowa in the case of Myers et al, vs. Chicago North-Western Ry. Co., 118 Iowa, 312.

In the cited case the Railroad Company, a citizen of the State of Illinois, sought to condemn land in Iowa belonging to Myers, a citizen of Pennsylvania. Myers, the non-resident land owner, appealed to the District Court of Iowa from the award of the commissioners, and the Railroad Company filed its application for removal to the Circuit Court of the United States.

The State District Court refused to order the removal of the case to the United States Circuit Court, which action was reversed by the Supreme Court of Iowa.

The opinion of the Supreme Court sets forth fully the provisions of the Iowa Statute now in force and construes

the same.

The Supreme Court of Iowa held that the Railroad Company was in fact *the defendant.*

Section 1999 of the Code, 1897, and the nine sections following, relate to proceedings and condemnation.

Section 2009 provides:

"That either party may appeal from such assessment to the District Court within thirty days after the assessment is made by giving the adverse party, or if such party is a corporation, its agent or attorney, notice in writing that such appeal has been taken. The sheriff shall thereupon file certified copy of so much of the appraisement as applies to the property appealed from and such court shall try the same as an action by ordinary proceedings. The land owner shall be plaintiff and the corporation the defendant."

We quote the following from the opinion of the Iowa Supreme Court in

Myers vs. Railroad Company, 118 *Iowa*, 315.

"An appeal, however, works no delay in the improvement if the corporation deposits with the sheriff the amount assessed, which he is to retain until the proceedings are terminated. (Section 2010 of the Code.)"

Section 2011 of the Code provides:

"On the trial of the appeal no judgment shall be rendered except for costs. The amount of damage shall be ascertained and entered of record, and if no money has been paid or deposited with the sheriff, the corporation shall pay the amount so ascertained or deposit the same with the sheriff before entering upon the premises. And the corporation declining to take the property and pay the damages awarded in the final determination of the appeal, then it shall pay in addition to the costs and damages actually suffered by the land owner, reasonable attorney fees to be taxed by the Court."

The Court again says:

"From these statutes it plainly appears that the proceedings before the commissioners appointed by the sheriff to appraise the land, is not a suit at law, but in the nature of an inquest to ascertain its value. No hearing is had, and no evidence introduced. The commissioners merely inspect the land and determine upon the amount of damage which will

be occasioned by the appropriation and make a written report to the sheriff; thus far then, the proceeding is in no respect a suit."

Again we quote from page 315:—

"That the proceeding to condemn land is not a suit within the meaning of the Removal Act of Congress, and is such after the appeal to the District Court, seems to be conclusively settled against the appellees in Boom Co. vs. Patterson, 98 United States, 403, 25 L. Ed. 207, and Railroad Company vs. Myers, 115 United States, 1; 29 L. Ed. 319; Searle vs. School District, 124 United States 197, 31 L. Ed. 415."

Again on page 317, the Iowa Supreme Court holds:—

"Appellees contend, however, that these decisions are not applicable because a change is made in the law by the Act of Congress of March 3, 1887, amended the following year. The object in this enactment was to restrict the jurisdiction of the Federal Court, both originally and by removal, and to obviate certain abuses in the matter of assignments of causes of action in order to confer jurisdiction, and the tendency has been toward a strict construction. Tennessee vs. United States, 454, 38 L. Ed. 511 and cases cited"

From page 324 we quote:—

"But it is urged that the Railroad Company is in reality the plaintiff, as it instituted the proceedings originally; the statute as seen authorizes the appointment of commissioners on the application of either the land owner or company. Either party has the right to appeal from the assessment to the District Court. The former could not be deprived of its property without the provision for a judicial proceeding, originally or by appeal." (Ragatz vs. City of Dubuque, 4 Iowa, 343). And trial by jury seems to be guaranteed by the constitution, Section 18, Article 1; Sigafoos vs Talbot, 25 Iowa, 214..... Indeed, the proceeding in so far as the District Court is concerned, was initiated by the notice of appeal. In such a case the Court in no sense reviews the previous finding, but investigates the value of the property *de novo*. If the assessment is paid, the Company may, as was done in this case, immediately enter into possession; it then appropriates the right of way; the only question remaining is the compensation; what the Company shall pay. It is in effect an action against the corporation for the value of the property taken. The case is not different than

it would have been had a statute authorized the initiative to be taken in the Districte Court, and damages for the taking assessed in the first instance in that tribunal.

This is the statutory reason for designating the land owner plaintiff, and the Company defendant."

The Court further holds, pages 324, 325—

"Here the action was carried to the District Court by the plaintiff. He was the party who invoked its jurisdiction, and as relief was then sought against the Company, we think both by statute and in the nature of the proceeding, it must be regarded the defendant."

In the case at bar Boynton had appealed to the District Court of Carroll county; it was Boynton who first invoked the jurisdiction of the State Court. The proceedings prior to the appeal were before a commission, a non-judicial body.

Boynton voluntarily sought a recovery in the State Court by invoking its jurisdiction under the provisions of the Iowa statute when he filed a notice of appeal. It was in this manner that a suit was initiated within the meaning of the Removal Statute.

In the language of the Iowa Supreme Court:

"Here the action was carried to the District by the plaintiff. He was the party who invoked its jurisdiction and as relief was then sought against the Company we think that both by statute and in the nature of the proceeding, it must be regarded the defendant."

The case of Kirby vs. Chicago Northwestern Ry. Co. 106 Fed Rep. 552, decided by Circuit Court, involved the same condemnation proceedings passed on by the Court in Myers vs. Railway Co. 118 Iowa 315.

The Circuit Court held that the Railroad company was in fact the actual defendant. We quote the following from the opinion of the Court on page 554.

"The plaintiffs were allowed $2,100.00; the plaintiffs could have taken the sum and the controversy would have been at an end. This must be so because the Company I presume, would have paid that, as it took no appeal. It from necessity, for plaintiff's use and benefit, deposited that sum with

the sheriff. It also was required to pay the costs. The Company took possession and appropriated the strip of land; we next have a controversy in the Marshall County District Court; the land owners placed the case there; for what purpose? Claiming damage for the appropriation by the Company of a strip of land, because the strip of land had been and could have been entered upon by the Company, provided they deposited twenty-one hundred dollars; the tribunal or whatever it was of the sheriff was statutory and not recognized by the constitution as one to which the parties could go. The State Court was the first tribunal in which effect could be given to the provisions that the rights of trial by jury shall remain inviolate and that other provision that private property may be taken for public use, as soon as damages shall be assessed by jury ..... So we have a controversy in Marshall County District Court; it is taken there by the land owners. The Company is there as any defendant is in court. It is taken there, and the Company is not asking relief in that court. It already has what it wants, to-wit: The strip of land, but the land owners are asking affirmative relief, to-wit: damages. I add the statement, to me of little importance, and certainly not controlling, that the Iowa statute in providing for the appeal, states The land owner shall be plaintiff, and the corporation defendant. ..... but I think it is an actual defendant, in view of the situation of the parties before the State District Court."

The Supreme Court of Kansas in the case of Chicago K. & W. R. R. Co. vs. Butts, 55 Kansas, 660, held that "In an appeal to the District Court from the award of damages in a railroad condemnation, the land owner becomes the plaintiff and the railroad company the defendant."

The Kansas Supreme Court cites in support of this conclusion Boom Company vs. Patterson, 98 United States, 403; Railroad Company vs. Owen, 8 Kansas, 274; Railway Company vs. Orr, 8 Kansas, 280; Risner vs. Strong, 24 Kansas, 297.

As the title to the land passed to the Railroad Company upon the payment of the amount of the award to the sheriff under the specific provisions of the Iowa statute and iff under the specific provisions of the Iowa statute and under

the decisions of the Iowa Supreme Court, we submit that the question as to whether the property of Boynton was thereafter subject to condemnation proceeding, was not involved.

For this reason the decisions which treat a non-resident land owner who is contesting and opposing condemnation of his land for railroad or other public purposes, as a defendant, are not in point, and do not militate against our claim—that where the title of the land has actually passed, and there is nothing in litigation but the amount of compensation to be paid, that the land owner is in such case the real plaintiff.

The case of Union Terminal Railroad Company vs. Chicago Burlington & Quincy R. R. Co., 119 Federal Reporter, 209, in which Circuit Court Judge Thayer concurred in the opinion of District Judge Phillips, does not conflict with our contention.

In this last cited case the property owner was a railroad corporation and was held to have the right to remove the case to the Federal Court. A reading of the opinion discloses that the real question in dispute was *the right to condemn and appropriate the property*, and not a question of damage, which is the only question in dispute in the case at bar.

"We quote from the opinion of the Court, page 215:

"Under the statute of this State (Missouri) authorizing the plaintiff railroad company to condemn land to its use, which provides that such petition may be lodged in the Circuit Court of the county where the real estate is situated, or before a Judge thereof in vacation and providing for the issuing of summons to the defendant land owner, returnable within ten days, the State Supreme Court holds that under Section 20, Article 2, of the State Constitution which provides that 'Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public, shall be a judicial question, and as such judicially determined without regard to any legislative assertion that the use is public: such matter is from its inception to its end judicial in its character.'"

The Court further holds, page 216:

"That the defendant owner of the land has the right in response to such summons, to appeear before the Circuit Court, or County Judge thereof in vacation, to challenge *the right to condemn,* and is entitled to be heard thereon, and from such official adjudication the right of appeal is accorded."

And again:

"As it appears from the answer of the non-resident defendant company filed in this case contemporaneously with the petition for the removal of the cause, that the defendant company *challenges the right of this plaintiff to have the land condemned to its use, because* it had already been appropriated to the use of the defendant railroad company, its rights are therefore protected by the statute of the state."

And again on page 217:

"In a condemnation proceeding, the courts of Missouri act as in other trials at law..... It would therefore seem that if a non-resident's property is sought to be taken and subjected to a public use, as claimed by this plaintiff, he should be entitled if he so elects, to have a Federal Court determine whether or not the conditions upon which the local laws authorize his property to be condemned, have been fairly and fully complied with, because by the statute the local court is empowered to hear and decide such questions as between a local corporation and a citizen of the state..... When the case has been removed into the Federal Court it can and should pursue the course of procedure in the trial of the issues, and the appointment of commissioners, as prescribed by the local statute."

This decision does not question the correctness of the rule for which we contend—that is that in a condemnation proceeding where the only question to be determined relates to the amount of damages to be recovered for property already appropriated by the condemning railroad company the land owner is in fact the plaintiff.

What we have said respecting the case of the Terminal Railroad Company vs. Chicago, Burlington & Quincy R. R. Co., 119, Federal Reporter 200, is applicable to that branch of the case of Madisonville Traction Company vs. St. Bern-

ard Mining Company, decided by District Judge Evans 130 Federal Reporter, 790.

This cause was held removable to circuit court on the petition of the non-resident land owner, but in this case the *right to condemn the property* was the question at issue. No notice was given to land owner until after the commissioners had assessed the value of the property, and had awarded the property to the condemning railroad. We quote from the opinion of the District Judge, page 790:

"Without notice to the Mining Company the county court appointed commissioners who valued the land sought by the Traction Company to be needed for its uses, and returned their report to the county court. Upon this being filed, process was served upon the Mining Company."

Again on page 793:

"The litigation or suit against the Mining Company was begun when the process was first issued, and that company then for the first time was tendered a day in court..... Counsel would have the Court divide this suit into two separate and distinct parts, treating one of these parts, viz: The controversy respecting the title to the land, as having been finally and conclusive settled by the preliminary proceeding taken in the county court *without notice to the owner*, and therefore as not being removable."

In the case at bar the notice required by the Iowa statute was served upon the land owner, and the land owner was thus apprised of the condemnation proceedings, of the appointment of the sheriff's jury and of the date upon which the assessment was to be made.

In the case cited, no such notice or process was served, and the *right to condemn* was therefore a question at issue and was the chief matter in dispute as shown by the opinion of the Court.

In the case Colorado, Eastern R. R. Co. vs. Chicago, Burlington & Quincy R. R. Co., 141 Federal Reporter, 898, the condemning railroad company sought to take land of another railroad company without giving the actual owner of the land notice of the proceeding. A temporary injunction

was granted on the petition of the non-resident railroad company, restraining the condemning company from taking the land until the question could be investigated in the Federal Court. It was held that the injunction would lie on the application of the real owner who was never notified of the condemnation proceeding, for it was taking the land without due process of law and without notice. The Court holds, page 903:

"The (Colorado) statute does not and could not lawfully undertake to conclude the rights and transmute the title of the real owner without notice and having his day in court..... The right of the complainant, as a non-resident citizen, to appeal to the equity jurisdiction of the Federal Courts, is not affected by the provisions of said Section 1726 of the Colorado statute which authorized it to enter its voluntary appearance and become a party to said condemnation proceeding. It is merely permissive in character and cannot be construed to operate as a denial of the non-resisdent's right to invoke the jurisdiction of the Federal Court *to protect its property rights when invaded without due process of law.*"

This case of Colorado Eastern Railroad Company vs. Chicago Burlington & Quincy Railroad Company does not involve any question of removal, and does not attempt to determine whether under facts like those in the case at bar, the non-resident land owner is defendant or plaintiff. It reiterates the doctrine that the Federal Court will protect a non-resident land owner whose property is sought to be taken without due process of law.

II.

THE FEDERAL COURT WILL RESPECT THE CONSTRUCTION PLACED ON CONDEMNATION STATUTES BY THE STATE COURT, AND SUCH CONSTRUCTION BECOMES A RULE OF PROPERTY.

First Question:—

The question of whether the United States Court ac-

quired jurisdiction in this cause, is to be answered by ascertaining what controversy existed when the petiton for removal was filed; and determining the relation of the respective parties to such controversy.

The proceeding for the condemnation of land is based wholly on the state statutes.

"The right of eminent domain, that is the right to take private property for public uses, appertains to every independent government. It requires no constitutional recognition. It is an attribute of sovereignty. The clause of the constitution of the several states providing for just compensation for property taken, is a mere limitation upon the exercise of the right; when the use is public; the necessity or expediency of appropriating any particular property, is not a subject of judicial cognizance."

Mississippi & Rum River Boom Co. vs. Patterson, 98 United States, 403; Colorado, etc., R. R. Co. vs. Jones, 20 Federal Reporter, 193; Cherokee Nation vs. Southern Kansas R. R. Co., 33 Federal Reporter, 900; Lewis on Eminent Domain, Section 1.

In Monongahela, et. Co. vs. United States, 148 United States 312, this Court held:

"The legislature may determine what private property is needed for public purposes; that is a question of political and legislative character; but when the taking has been ordered, then the question of compensation is judicial."

To the same effect is in re Buffalo, 130 N. Y. 422.

Dillion Municipal Corporations, Sections 600, 619.

The distinction between the authority to take the land and the authority to determine the compensation for the land taken, is distinctly recognized in

United States vs. Jones, 109 *U. S.* 513.

This Court in Madisonville Traction Co. vs. St. Bernard Mining Company, 196 U. S. 250, collects the cases on this question and holds:

"If the purpose be public, the taking may be outright, provided reasonable and adequate provision is made at the

time of appropriation, to ascertain and secure the compensation to be made to the owner."

The rights of the parties and the relations each bear to the controversy, is necessarily determined by reference to the statutory provisions as construed by the State Court of last resort. The construction given by the state Court is controlling for it is the established doctrine of the United States Courts that the decisions of the highest tribunal of the State will be followed in all matters pertaining to the construction of State Statutes, and the decisions of the State Court respecting the condemnation of real estate establish a rule of property.

When the petition for removal in the case was filed, under the decisions of the Iowa Court in Myers vs. Chicago & Northwestern Ry. Co., 118 Iowa, 324, the case was then, in the language of the Iowa Supreme Court.

"In effect an action against the corporation for the value of the property taken. The case is not different than it would have been had the statute authorized the initiative to be taken in the District Court and the damages for the taking assessed in the first instance in that tribunal. This is the statutory reason for designating the land owner plaintiff and the company defendant. Here the action was carried to the District Court by the plaintiff. He was the party who invoked its jurisdiction, and as relief was then sought against the company, we think both by statute and in the nature of the proceeding, it must be regarded the defendant."

In Leffingwell vs. Warren, 67 U. S., 2 Black, 590, this court held:

"The construction given to the statutes of a state by the highest tribunal of such state, is regarded as a part of the statute, and is as binding upon the courts of the United States as the text."

The provisions of the Revised Statutes of the United States that the law of the several states shall be regarded as rules of decision in trials at common law, is construed to require such decisions to be construed as the law of the State where announced by its highest tribunal. This Court

has held in Bucher vs. Cheshire R. R. Co., 125 U. S. 555:

"The decisions of the highest court of the State in regard to the validity or meaning of the constitution of that State or its statutes, are to be considered as the law of that State within the requirements of this section."

In discussing the rights of states respecting the exercise of the power of eminent domain, this court in West River Bridge Co. vs. Dix 6 How. 507, held:

"It then being clear that the power in question not being within the purview of the restriction imposed by the 10th section of the First Article of the Constitution, it remains with the states to the fullest extent in which it inheres in their sovereign government, to be exercised by them in that degree that shall be by them deemed commensurate with public necessity. So long as they shall steer clear of the single predicament denounced by the constitution, shall avoid interference with the obligation of contracts, the wisdom the modes, the policy, the hardship of any exertion of this power, are subjects not within the proper cognizance of this court. This is in truth purely a question of power; and conceding the power to reside in the state government, this concession would seem to close the door upon all future controversy in connection with it."

This Court held in the case of Long Island Water Supply Co. vs. Brooklyn, 166 U. S., 685:

"So far as respects any mere matter of procedure, or conflict between the statute authorizing the condemnation, or the proceedings had thereunder, and the constitution of the state, the decisions of the Court of Appeals is conclusive."

This last cited case came to this Court upon a writ of error from the Supreme Court of the State of New York, which involved a condemnation proceeding brought by the City of Brooklyn to condemn the property of the plaintiff in error.

In the case of

Bucher vs. Cheshire, 125 U. S. 555.

Mr. Justice Miller in speaking for this Court, said:

"It is also well settled that where a course of decisions, whether founded upon the statutes or not, have become rules of property as laid down by the highest courts of the state,

by which is meant those rules governing the descent, *transfer or sale of property, and the rules which affect the title and possession thereto,* they are to be treated as laws of that state by the Federal Courts. The principle also applies to the rules of evidence. In Ex. parte Fisk, 113 U. S., 720, this Court said:

"It has been often decided in this court that in actions at law in the courts of the United States, the rules of evidence and the law of evidence generally of the State, prevail in these courts."

See also

Wilcox vs. Hunt, 38 *U. S.*, 13 *Pet.* 378.
Ryan vs. Bindley, 68 *U. S.* 1 *Wall*, 66.

The authoritative character of the decisions of the State Courts upon Federal Courts, in cases arising in such jurisdiction has been recognized in a variety of cases.

In Lowndes vs. Board, etc., 153 U. S., 1, the alleged right of a license in certain Oyster fisheries, and involved, and it was held:

"In respect to the matter o ftitle there are involved not merely the construction of public grants, charters, but also the extent and purpose, to, and for which the title of and control of submerged lands may be passed away from the state to town and individuals. The question is of the rights attached to certain lands within the territorial limits of the state, and whatever becomes a settled rule of real property by the decisions of its courts, is conclusive on this Court. Bondurant vs. Watson, 103, U. S. 281; Burgess vs. Seligman, 107 U. S. 20; 33; Gage vs. Pompelly 115, U. S. 454; Hardin vs. Jordan, 140, U. S., 371, 382, 402; Shively vs. Bowlby (Ante P. 331)".

Wherever the question pertains to any matter of local law even though the decisions of the Federal Court conflict with the state decisions, the latter will control. This has been held in respect to action for recovery of taxes, and the question as to whether recovery for one year is res judicata as to the taxes for other years.

"But apart from that, it is enough that in Tennessee the doctrine of res adjudicata is not applicable to taxes for

years other than those under consideration in the particular case, inasmuch as what would affect a judgment of the State Court so far as *re judicata* is a question of state or local law, and the taxes involved in this State, are taxes for years other than those involved in the prior adjudication."

Union, etc., Bank vs. City of Memphis, 189 *U. S.* 71.

The Supreme Court of Louisiana having decided under the laws of that state that an unrecorded mortgage has no effect unless reinscribed after 10 years, the Supreme Court of the United States held the decisions of the State Court, establishing as they do, a rule of real property in the State of Louisiana, are binding in this court and are conclusive in this case.

Bonduraut vs. Watson 103, *U. S.* 281.

The provisions of the California statutes as interpreted by its Supreme Court authorizing mortgage foreclosures by making the administrator of a deceased mortgagor, sole defendant, is binding on the Federal Courts in that state as it establishes a rule of property.

Hearfield vs. Burgess 75 *Federal Reporter* 17.

Where the State Courts have determined the competency as evidence of records of certain deeds, it was held in the Court of Appeals, Eighth Circuit, that such construction is binding upon the Federal Courts, as establishing a rule of property.

"The construction by the highest judicial tribunal of a state of its constitution or statutes, which establishes a rule of property is controlling authority in the courts of the United States."

Union Pacific Railroad Co. vs. Reed, 25 *C. C. A.* 389.

The Supreme Court of Illinois held that a tax sale of property is invalid if any part of the tax were unauthorized and such decision is binding upon the Federal Courts.

"These decisions establish a rule of property which determines the present case, for without reference to other ob-

jections urged to the validity of the sale under which appellant claims title, it satisfactorily appears that a part of the taxes were unauthorized."

Gage vs. Pompelly, 115 *U. S.* 454.

The authoritative character of the decision of the State Court will be recognized, even where the effect is to prevent a case from being removed which would otherwise be removable to the Federal Courts.

So closely and carefully has this rule been followed that if the highest court of the state advises new views as to the proper construction of a state statute and reverses its former decision, the Federal Courts will follow the latest decision of the State Court.

Leffingwell vs. Warren, 67 *U. S.* 2 *Black*, 599.
United States vs. Morrison 4 *Pet.* 124.
Green vs. Neals Lessee, 6 *Pet.* 291.

The Supreme Court of New Hampshire, the highest court of that state having given a construction to a state statute that it was in substance a penal statute, and that a suit or proceeding upon it was a criminal proceeding for an infraction of a law of the state, the Federal Court must adopt that construction.

We quote from New Hampshire vs. Grand Trunk Ry. 3 Federal Reporter, 887-888:

"If so, it is quite clear this cause must be remanded to the State Court. This court had no jurisdiction of the subject matter of it when commenced; it has not now. The statute of 1875, Sec. 2 (Chapter 137, Volume 18, page 470, United States Statutes at Large) in which it is claimed the removal of this cause is authorized, provides only for the removal of causes of a civil nature. This is criminal."

Where Acts of Congress provide for condemnation of property for the use of the United States in accordance with the procedure of the law of the State for the condemnation of real estate, the decisions of the State Courts are controlling and will be followed by the Federal Courts, even though the

mode of procedure is at variance with the ordinary procedure in civil cases.

"Upon a re-examination of the question I am confirmed in the opinion that the statutes of this state as expounded by its Supreme Court, prescribe a special and peculiar mode of procedure distinct from the practice in civil actions. Therefore the provisions of the Act authorizing courts in which actions are tried to set aside verdicts for error in assessment or damage are not applicable and do not authorize the same courts to grant new trials in condemnation cases."

United States vs. Freeman, 113 *Federal Reporter*, 370-372.

We submit that if this Court holds that this case is removeable by Boynton the land owner, and that the United States Circuit Court acquired jurisdiction, it would in effect directly conflict with the holding of the Supreme Court in Myers vs. Chicago & Northwestern Railway Company. *Supra.*

It will be in conflict with the decision of the highest State Court in respect to the construction of an Iowa statute, the State Court holds that when a non-resident land owner submits himself to the condemnation proceeding instituted in a State Court, and brings the proceedings from the sheriff's commissioners into the State Court, he submits himself to the jurisdiction of the State Court, and has nothing thereafter to contest save the amount due him for the value of the property taken, in which proceeding he occupies the status of a plaintiff and not that of a defendant.

In the case of Meyers vs. Chicago & Northwestern Ry. Co. 118 Iowa, 312, the railway company removed the case to the Federal Court, as a defendant and it was held to be a *defendant* under the construction given to the Iowa Statute.

In the case at bar if Boynton was defendant when the removal was asked, then the railway company in the Meyers case could not have been thedefendant, although, the Supreme Court of Iowa so held.

The Iowa court construing the State Statutes, has announced a rule that is binding on the courts of that state.

On the appeal of the land owner to the District Court of the State in condemnation proceedings, the Railway company under the Iowa decisions may remove the cause to the Federal Court.

If it be held now that the Railway company is not the defendant and such holding is based upon the construction of the State Statutes the construction of the Iowa Statute by the highest court in that state is not followed.

The question presented to this court affords the best possible illustration of the reason requiring the decisions of such tribunal to be followed as authorities. The decision establishes a rule of property; the procedure is altogether statutory. There is no claim that the procedure is in violation of any constitutional right. There is no claim that the non-resident owner was not duly advised of the attempt of the condemning railroad company to take his property, and of the proceeding before the sheriff's jury for the assessment of the value thereof.

The non-resident land owner voluntarily appeared in such condemnation proceding within the time fixed and voluntarily perfected his appeal from such condemnation proceeding before the sheriff's jury, as provided by the State Statutes, and brought the case from the non-judicial body before a judicial body, the State District Court.

The non-resident land owner was then voluntarily seeking to prosecute his claim for damages, the only question left open to contest, and the only question which he has attempted to contest at any time. After voluntarily invoking the jurisdiction and assistance of the State Court, he filed his petition for removal to the Federal Court. The case would not have been in the State Court save for the action of the non-resident land owner. He used the State Court for the purpose only of leaving the State Court.

These facts create questions involving the construction of the State Statutes, and the effect of the procedure provided

by such statutes. The Iowa Supreme Court has unequivocally passed thereon in the cause of Myers vs. Chicago & Northwestern Ry Co., 118 Iowa, 312.

General rules of law are not involved save as they aid in determining the mode of procedure prescribed by the statute, and the nature of the issue and character of the controversy existing at any particular stage of the procedure. The true character of the procedure, the matter in issue, the relation each party bears to the controversy have all been determined by the decisions of the State tribunal, the last resort, and we submit its decision should be conclusive.

III.

THE CIRCUIT COURT CANNOT TAKE COGNIZANCE OF THIS SUIT THROUGH A REMOVAL BY ANYONE SAVE THE "DEFENDANT THEREIN BEING NON-RESIDENTS OF THAT STATE." A FAILURE TO SO REMOVE IS A TRULY JURISDICTIONAL DEFECT.

Second Question:

The second question presented to this Court by the Circuit Court of Appeals (Certificate page 2) is "If the land owner was not a defendant within the meaning of the removal statute, could the Circuit Court take cognizance of a suit through a removal by him? Stated in other words the question in this. Is the provision of the removal statute to the effect that the removal on the grounds of diverse citizenship made by the defendant or defendants therein being non-residents of that state restrictive and jurisdictional, in the sense that cognizance of the suit can be taken by the Circuit Court through a removal only when it is by the defendant, or is the provision only modal and formal in the sense that non-compliance therewith or non-conformity thereto, may be waived?"

In the case of Martin et al vs. Snyder et al, 148 U. S. 663, it was held under the Act of Congress, March 3, 1887, that defendants who are residents of the State in the court of which action is pending cannot remove the same into the

Circuit Court of the United States, and it appearing that the cause was removed on the application of *resident* defendants, a decree rendered in the Circuit Court against the defendants who so removed the cause, was set aside for want of jurisdiction.

The decision rendered by the Chief Justice is not lengthy and we quote the entire decision:

"This was a bill of complaint, filed by Samuel F. Engs, George Engs and Henry Snyder, Jr., of the City, County and State of New York, against Morris T. Martin, Carrie E. Martin, in the Circuit Court of Lake County in the State of Illinois, on the 27th day of October, 1887. November 7th, 1887 the defendants preferred a petition for the removal of the cause to the United States Circuit Court within and for the Northern District of Illinois on the ground of diverse citizenship, and the cause was transferred accordingly.

The petition stated: "That the controversy in said suit is between citizens of different states, and that the petitioners were at the time of the commencement of this suit and still are citizens of the State of Illinois, and that all the plaintiff's were then and still are, citizens of the State of New York."

Under the Act of Congress, March 3, 1887, (24 Stat. at L. 552 Chap. 373), it is the defendant or defendants who are non-residents of the state in which the action is pending who may remove the same into the Circuit Court of the United State for the proper district. The defendants here were not entitled to such removal, and a decree which was in favor of the complainants, and from which the defendants prosecuted this appeal, must be reversed for want of jurisdiction, with costs against the appellants and the case remanded to the Circuit Court, with directions to render a judgment against them for costs in that court, and to remand the case to the State Court.

Torrence vs. Shedd, 144 *United States* 527-533."

This decision was rendered under the present act respecting removals from State to Federal Courts.

It clearly holds in language that cannot be misunderstood, that where the defendant is a resident of the state in which suit is brought, he may not remove the cause, and that

when the cause is so removed, jurisdiction is not acquired by the Federal Court.

If the inquiry submitted to this court asked whether the provisions of the removal statute to the effect that the removal should be made by a defendant who is a non-resident of that state, is only modal and could be waived, the decision of this court in Martin vs. Snyder would be a complete answer.

Is there any distinction when a plaintiff non-resident secures the removal, than when a defendant resident secures the removal? No reason can be urged for a distinction.

To the same effect see the case of Fife vs. Whitel, 102 Federal Reporter 537, (C. C. A.,) in which Circuit Judge Morrow held:

"This restriction of the right of removal to non-residents of the state, based upon the residence of the defendant, is clearly jurisdictional, and if it does not appear in the record of the State Court it must be clearly shown in the petition of removal as a right which it has and claims, or it will be presumed not to exist."

In the case of Torrence vs. Shedd, 144 United States 527 this court held:

"For the reasons above stated, the original removal of the petition of the appellant was wrongful and therefore the judgment must be reversed for want of jurisdiction, with costs against the appellant and the case remanded to the Circuit Court, with direction to render a judgment against him for costs in that court, and to remand the cause to the State Court."

This decision involved the construction of the removal statute of March 3, 1875, and whether the controversy was separable within the meaning of such statute.

This Court in the case of Ayers vs. Watson, 113 U. S. 594, had occasion to construe Section 2 of the Act of 1875, and speaking through Mr. Justice Bradley held that Section 2, of the Act of 1875 was "the fundamental section based on the constitutional grant of judicial power." We quote the

following, where the Court construes Section 2, of the Act of 1875.

"This is the fundamental section based on the constitutional grant of judicial power. The succeeding ones relate to the forms of proceeding to effect the desired removal ..... The second section defines the *case in which* a removal may be made. The third prescribes the mode of obtaining it, and the time within which it should be applied for. In the nature of things the second section is judictional and the third is put modol and formal.

The conditions of the second section are indispensible and must be shown by the record. The directions of the third though obligatory, may to a certain extent be waived. Diverse citizenship of the parties or some other jurisdictional fact prescribed by the second section is absolutely essential and cannot be waived, and want of it will be error at any stage of the cause, even though assigned by the party at whose instance it was committed.

Mansfield C. & L. M. R. Co. vs. Swan, 111 *United States*, 370."

The decision of the Court in Ayers vs. Watson, 113 U. S. 594 has been reaffirmed in many subsequent decisions of this Court, and received its sanction in Martin vs. Baltimore & Ohio R. R. Co. 151 U. S., 673, in which opinion Mr. Justice Gray on page 690 quotes fully and approvingly therefrom.

Section 2 of the Act of 1875, which was construed in Ayers vs. Watson, 113 U. S. 594, and Martin vs. Baltimore & Ohio Railroad company, 151 U. S. 673-690, is also Section 2 in the Acts of 1887-1888.

In this last named Act it is provided:

"Any other suit of civil nature at law or in equity.... ....may be removed into the Circuit Court of the United States for the proper district, by the defendant or defendants being non-residents of that State."

In the language of Justice Bradley in construing Section 2 of the Act of 1875, we submit that it was the purpose of Congress in the legislation of 1887-88 to leave Section 2, "as the fundamental section based on the constitutional grant of judicial power."

The Act 18, 1887-88 was passed to contract the jurisdiction of the Circuit Court.

In Hanrick vs. Hanrick, 153, U. S., 192, this court said:

"It was intended to contract the jurisdiction of the Circuit Court of the United States, whether original over suits brought therein, or by removal from the State Court."

In Fisk vs. Henarie 142 U. S. 459 the Court said:

"The attempt was manifestly to restrain the volume of litigation pouring into the Federal Courts, and to return to the standard of the Judiciary Act."

In re Pennsylvania, 137, U. S. 451 the Court said:

"The general object of the Act is to contract the jurisdiction of the Federal Court."

In Smith vs. Lyon, 133 U. S. 315, the Court said:

"It was a statute mainly designed for the purpose of restricting the jurisdiction of the circuit court of the United States."

In the case Parkinson vs. Barr, 105, Federal Reporter, 81-83 District Judge Hawley in discussing whether all the defendants must join in removing the case from the State to the Federal Court said:

"The question to be discussed is: "Can the removal of this case from the State Court be sustained upon the ground that the parties are residents and citizens of different states, unless it clearly appears that all the defendants who join in the petition for removal are non-residents of the State where the suit is brought. This question is important. In involves a construction of the provisions of the removal act of 1887-88. In construing the provisions of this Act it must constantly be kept in mind that it was passed for the express purpose of limiting the jurisdiction of the United States Circuit Court, as given by the removal Act of 1875."

And again:

"Under this statute it is clear that in actions where there is no separable controversy, a right of removal can be exercised only by non-resident defendants. Telegraph Company vs. Brown, 32 Federal Reporter, 337: Anderson vs. Appleton, 32 Federal Reporter, 855: Weller vs. Tobacco Company, 32 Federal Reporter 860:" and numerous other cases cited.

The author in Black's Dillion on Removal of Causes, Section 65 states: "But the Act of 1887 which is re-actionary in its general character, has almost wholly restricted this right (of removal) to the defendant; there is one single case in which a plaintiff may still exercise the right of removal, to-wit: 'Where the suit is one between citizens of the same state, claiming lands under grants of different states; but in all other cases the new Act by declaring that the removal may be made by the defendant or defendants therein' has excluded the plaintiff from the exercise of this privilege."

And again:

"Although every element of removability is present in the case it cannot be transferred unless the defendant asks for it. The plaintiff cannot remove either on the ground of the diverse citizenship of the parties, or on the ground of prejudice and local influence, or on the ground that there is a separable controversy between the defendants or one of them and himself, or because the case has arisen under the constitutional laws of the United States."

And again from Section 65:

"In a proceeding for the condemnation of private property under the power of eminent domain, if the land owner asserting his right to compensation or appealing from the award of damages, is to be regarded as the plaintiff, (which may or may not be the case, according to local practice), then he has no right to remove the case to the Federal Court."

From section 13 of the same author, we quote:

"The intention of the Removal Act of 1887 to restrict removals of cases from State Courts to Federal Courts and to limit the jurisdiction of the latter courts of such cases is perfectly plain, hence this statute should be strictly construed against anyone seeking to evade the additional requirement which it puts upon the right of removal."

IV.

THERE CAN BE NO WAIVER OF THE DEFECT IN THE JURISDICTION OF THE CIRUCUIT COURT, IF THE REMOVAL IS NOT MADE BY THE DEFENDANT AS REQUIRED BY SECTION 2 OF THE REMOVAL ACT.

Second Question:—

In Graves vs. Corbin, 132 U. S. 571, this Court on page

592 held:

"Under the provisions of Section 5 of the Act of March 3, 1875 (18 Stat. 472) that if in any suit removed from said Court to the Circuit Court of the United States, which shall appear to the satisfaction of said Circuit Court at any time after said suit has been removed thereto, that it does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, it shall proceed no further therein, but shall remand the suit to the Court from which it was removed as justice may require This Court has held that when it appears to this Court that the case is one under which provision the Circuit Court should not have taken jurisdiction, it is the duty of this Court to reverse any judgment given below and remand the cause, with costs against the party who wrongfully invoked the jurisdiction of the Circuit Court. Williams vs. Nottawer Twp. 104 United States 209. This rule has been recognized by this Court to the extent even of taking notice of the want of jurisdiction in the Circuit Court, although the point has not been formally raised in that court or in this court: In Turner vs. Farmers Loan & Trust Company, 106 United States, 522-555; Mansfield C. & L. M. R. Co. vs. Swan, 111 United States, 379-386; Fannington vs. Pillsbury, 114 United States, 138-144; Cambridge Co. vs. Oto Co. 120 United States 225."

To the same effect we cite the case of Stevens vs. Nichols 130 U. S. 230; Crehoe vs. Ohio, etc., 131 United States 240; Jackson vs. Allen 132 United States 27.

In Jackson vs. Ashton, 8 Peters 148, this Court itself raised and insisted on the point of jurisdiction in the Circuit Court; in that case it was expressly ruled that because it did not appear that the Circuit Court had jurisdiction, this Court on appeal had no jurisdiction except for the purpose of reversing the decree appealed from on that ground.

In Mansfield C. & L. M. R. Co. vs. Swan, 111 United States 370, this Court referred to situation of a party who brought the case to the Federal Court subsequently taking advantage of the failure of the Court to thus acquire jurisdiction.

"But the rule springing from the nature and limits of the

judicial power of the United States is inflexible, and without exception which requires this Court of its own motion to deny its own jurisdiction and in the exercise of its appellate power that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which in the exercise of that power it is called to act. On every writ of error or appeal, the first fundamental question is that the jurisdiction, first of this court, and then of the court from which the record comes. This question the Court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it.....

Again, the court holds in the same case, page 389:

"It acts upon the principle that the judicial power of the United States must not be exercised in a case to which it does not extend, even if both parties desire to have it exercised. Cutler vs. Rae, 7 How. 789.'

The Court quoted with approval in this last cited case, from the minority opinion of Mr. Justice Curtiss, in the Dred Scott case, 19 How. 393-400.

I consider therefore, that when there is a plea to the jurisdiction of the Circuit Court in a case brought here by writ o ferror the first duty of this court is to Sua Sponte, if not moved to it by either party to examine the sufficiency of that plea and thus to take care that neither the Circuit Court nor this court shall use the judicial power of the United States in a case to which the constitution and laws of the United States have not extended that power."

In United States vs. Huckabee, 16 Wall. 414, the "plaintiffs in error were seeking to reverse on the merits an adverse decree vesting title in the opposing party, in a proceeding instituted by themselves; the Court reversed the decree to their advantage for want of the jurisdiction of the court below, which they had invoked and set in motion."

In Thompson vs. Railroad company, 6 Wall. 134, the question was one purely of procedure; whether the remedy was at law or in equity although in that class of cases the jurisdiction relates to the subject matter and is administered by the same court, but in another form of proceeding. It was there held the parties could not waive by their conduct, such question of jurisdiction.

In the case of Martin, Adm. vs. Baltimore & Ohio R. R. Co., 151, United States, 690, this Court quotes with approval from the case of Ayers vs. Watson, 113 United States, 594, and holds:

'Section 2 of the Acts of 1875 define the class of cases which might be removed into the Circuit Court of the United States, as the fundamental section, based on the constitutional grant of judicial power. The succeeding sections relate to the forms of proceeding to effect the desired removal.... The second section defines the cases in which a removal may be made. The 3rd prescribes the mode of obtaining it and the time within which it should be applied for. In the nature of things the second section is judicial, and the third is but modal and formal; the conditions of the second section are indispensible and must be shown by the record, the directions of the third, though obligatory, may to a certain extent be waived. *Diverse citizenship of the parties, or some other jurisdictional fact prescribed by the second section, is absolutely essential, and cannot be waived, and the want of it will be error at any stage of the cause, even though assigned by the party at whose instance it was made.*"

We quote from Section 65 Black's Dillon Removal of Causes:

"If the question is not as to any mere defect or informality of the proceeding, but goes to *the substantive right of removal*—in other words, the jurisdiction of the Federal Court the rule is altogether different: such objection cannot be waived by a party, nor can his consent confer on the Federal Court a jurisdiction which it would not otherwise possess."

Section 2 of the Act of Congress, 1887-88, provides the class of cases and the parties in such class of cases who may remove the cause to the Federal Court: this relates to the *right of removal* and necessarily limits the jurisdiction of the Federal Court.

In the recent case of Minn. vs. Northern Securities Company, 194, U. S. 48, all the defendants joined in a petition for removal from the State Court to the Circuit Court, both parties contended that the removal was properly taken, and that the cause was one over which the Circuit Court acquired

jurisdiction by the Removal Act. This Court held on page 62:

"But consent of the parties can never confer jurisdiction upon a Federal Court; if the record does not affirmatively show jurisdiction in the Circuit Court we must upon our own motion so declare, and make such order as will prevent that Court from exercising an authority not conferred upon it by statute."

If section two of the act of 1887 is truly jurisdictional as we submit this court held it is not modal and cannot be waived. In the language of the dessenting opinion of Justice Curtiss in Dredd Scott case 19 How. 393. "The true question is not what either of the parties may be allowed to do, but whether this court will affirm or reverse a judgment of the Circuit Court when it appears on the record by a plea to the jurisdiction that it is a case to which the judicial power of the United States does not exist."

V.

THE JUDICIAL PROCEEDING WHICH THE LAND OWNER IS AUTHORIZED BY THE STATUTES OF IOWA TO INITIATE IN THE DISTRICT COURT OF THE STATE BY APPEALING FROM THE ASSESSMENT OF THE COMMISSIONERS SELECTED BY THE SHERIFF, IS A PROCEEDING WHICH COULD BE ORIGINALLY INSTITUTED IN THE CIRCUIT COURT OF THE UNITED STATES WITHIN THE MEANING OF THE REMOVAL ACT.

Third Question:—

The third question submitted in the certificate (page 3) is, "Is the judicial proceeding which the land owner is authorized by the statutes of Iowa to initiate in the District Court of the State by way of a so-called appeal from the assessment of the commissioners selected by the sheriff, a suit which can be originally instituted in the Circuit Court of the United States, when the citizenship of the parties and the sum or value of the matter in dispute are such as to make the suit otherwise cognizable in that court:

It appears to us that the answer to this interrogatory is governed by the case of Madisonville Traction company vs. St. Bernard Mining Company, 196 U. S. 239.

The Traction Company was a Kentucky corporation, and the Mining company was a Deleware Corporation; the Traction Company sought to condemn the land of the Mining Company for right of way purposes. An application was made under the Kentucky statutes by filing in the office of the Clerk of the County Court, a description of the land required, and commissioners were appointed to assess the damages which the owner was entitled to receive.

The commissioners are required to make their award of damages and it is the duty of the Clerk of the Court upon application of the condemning company after award to issue process against the owners to show cause why the record and award should not be confirmed, and to make such other, other as are required by the Civil Code of practice.

Upon a confirmation of the report of the commissioners which confirmation is made after process has been served upon the owners, the condemning company upon payment of the damages and costs becomes entitled to take possession of the land and to use the same for the purpose of which it is condemned, as fully as if the title had been conveyed to it.

The commissioners appointed by the County Court in above proceeding awarded One Hundred Dollars as damages to be paid by the Mining Company. Process having issued, the Mining Company before any action was taken upon the report, filed its petition and bond for removal of the cause into the Circuit Court of the United States.

The County Court refused to recognize any right of removal to the Circuit Court of the United States, and thereupon the Mining Company, the Delaware corporaion, filed in the Circuit Court a transcript of the proceedings of the State Court. The effect of the proceeding is determined in this case brought by the Mining Company as an original suit in

equity in the Federal Court seeking to prevent the condemnation of the land of the Mining Company to railroad purposes and asking an injunction restraining further prosecution of condemnation proceedings.

This Court held that:

"The case presented in the County Court was a suit or controversy between citizens of different states within the meaning of the constitution and the laws of the United States; it was as already said, a judicial proceeding initiated in a tribunal which constitutes a part of the judicial establishment of Kentucky as maintained by its statutes (Kentucky Statute 140), and the Court, although charged with some duties of an administrative character, is a judicial tribunal and a court of record."

On the question as to whether the suit could have originally been brought in the Federal Circuit Court, this Court holds:

"Why could not the proceeding instituted in the County Court have been brought originally in the Federal Court? The case as made in the County Court was beyond question a judicial proceeding; it related to property rights; the parties were corporate citizens of different states; and the value of the matter in dispute exceeded the amount requisite to give jurisdiction to the Circuit Court. It was therefore a proceeding embraced by the very words of the constitution of the United States, which declares that the judicial power shall extend to controversies between citizens of different states, as well as by the Act of 1887, Section One, which declares: 'That the Circuit Courts of the United states shall have original cognizance concurrent with the Courts of the several states, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds exclusive of interest and costs, the sum of Two thousand dollars.....in which there shall be a controversy between citizens of different states.' In view of these explicit provisions it is clear that the proceeding in the County Court was a suit or controversy within the meaning both of the constitution and of the judiciary Act. We could not hold otherwise without overruling former decisions of this court. Let us see whether this be not so; referring to the clause of the statute defining the judicial power of the United States, Chief Justice Marshall, speaking for the Court in Osborn vs. Bank

of United States, 9 Wheaton, 738-819, said: 'This clause enables the judicial department to receive jurisdiction to the full extent of the constitution, laws or treaties of the United States when any question respecting them shall assume such a form that the judicial power is capable of acting on it; that power is capable of acting only when the subject is sumitted to it *by a party who asserts his rights in the form prescribed by law.* It then becomes a case and the constitution declares that the judicial power shall extend to all cases arising under the constitution, laws and treaties of the United States."

The facts in the Kentucky case differ essentially from the facts in the case at bar; under the Iowa statute the sheriff appoints the commissioners. Under the Kentucky statute the County Court appoints the commissioners. Under the Iowa statute the proceedings before the commissioners are effective only after notice has been served upon the land owner, apprising him of the condemnation and of the day fixed for the assessment of his damage, at which time he may appear before the commissioners.

Under the Kentucky statute the notice is served after the report of the commissioners is made, and the land owner up to that time has had no opportunity to protect his rights.

Under the Iowa statute the proceedings before the sheriff are non-judicial in character. Under the Kentucky statute the proceedings in the County Court are judicial.

Under the facts in the case at bar Boynton, the non-resident land owner, brought the case into the State Court and voluntarily appeared in the condemnation proceeding and invoked the jurisdiction of the State Court, from which he immediately sought to remove the proceedings to the Federal Circuit Court.

In the Kentucky case the title had not passed to the property, when the case was removed as a suit from the county court a judicial tribunal into the Federal Court.

In the case at bar the property had been condemned for railroad purposes, and after due notice to Boynton the non-

resident land owner, there was nothing left to contest in the State District Court when he appealed thereto, save the one question of the amount of compensation or value of the land.

In the language of Mr. Justice Field in the case:

Mississippi & Rum River Boom Company vs. Patterson, 98 U. S. 403.

"The proceeding in the present case before the commissioners appointed to appraise the land, was in the nature of an inquest to ascertain its value, and not a suit at law in the ordinary sense of those terms, but when it was transferred to the District Court by appeal from the award of the commissioners it took under the statute of the state, the form of a suit at law, and was thenceforth subject to its ordinary rules and incidents. The point in issue was the compensation to be paid to the owner of the land; in other words, the value of the property taken. No other question was open to contestation in the District Court. (Turner vs. Holeran, 11 Minnesota, 253). The case would have been in no essential particular different had the state authorized the Company by suit to appropriate the particular property in question, and the owners to bring suit against the Company in the courts of law for its value."

We submit that at the time that Boynton, as non-resident land owner, voluntarily entered his appearance and appealed to the State District Court, thereby initiating as he had the right to do, legal proceedings to recover compensation in a judicial tribunal of the state, he could, had he so elected, have brought a suit in the United States Circuit Court, alleging the appropriation of his land in the condemnation proceedings and he would have had a right to recover in such court the value of his land.

This question can receive no other answer than the one we give it in the light of the exhaustive opinion in Madisonville Traction Company vs. St. Bernard Mining Company, 196 U. S., 239.

VI.

THE MASON CITY & FORT DODGE RAILROAD

COMPANY BY APPEARING IN THE CIRCUIT COURT WITHOUT OBJECTING TO THE JURISDICTION OF THE CIRCUIT COURT, DID NOT AND COULD NOT GIVE THE CIRCUIT COURT JURISDICTION TO RENDER JUDGMENT IF THE CASE WAS REMOVED THERE UNDER THE PROVISIONS OF THE REMOVAL STATUTE.

Fourth Question:—

The Fourth question submitted is "If the Circuit Court could not have taken cognizance of the suit through the removal by the land owner, and if the Circuit Court could have taken cognizance of the suit through its original institution in that court after the assessment by the commissioners, did the parties by appearing in the Circuit Court and there litigating to a final conclusion the matter in dispute, without any objection to the jurisdiction of the Court, or to the manner in which its jurisdiction was invoked, authorize the Circuit Court to exercise jurisdiction, and to proceed to final judgment in like manner and with like effect as if the suit had been originally instituted in that court, the citizenship of the parties and the sum or value of the matter in dispute being such as to make the suit otherwise cognizable in that Court?"

The answer to this question is controlled by the provisions of the Removal Statute of 1887-88. This statute defines the class of cases which may be transferred from the State Court to Federal Courts.

If Boynton the non-resident land owner, was the plaintiff, as we contend, he could not transfer the cause from the State District Court to the Federal Circuit Court, and his case was within the class that could not be transferred.

Boynton the non-resident land owner, could have brought the suit originally in the Federal Circuit Court, as shown in response to the Third question submitted by the Circuit Court of Appeals. He determined otherwise, and elected to initiate the proceeding in the State District Court; he cannot now urge the jurisdiction of the Circuit Court unless it is permitted by the Removal Statute.

We submit that the case of Martin vs. Snyder 148 United States, 662 is decisive of this question, and unmistakably leads to the conclusion that the Circuit Court could not acquire jurisdiction.

The failure of this plaintiff in error to file a motion to remand and proceeding to trial without objection to the jurisdiction can not enlarge the jurisdiction of the Circuit Court.

The case last cited was decided under the Act of Congress March 3, 1887 the opinion was written by the Chief Justice.

"This was a bill of complaint filed by Samuel F. Engs, George Engs and Henry Snyder, Jr., of the City, County and State of New York, against Morris T. Martin and Carrie E. Martin in the Circuit Court of Lake County in the State of Illinois, on the 27th of October, 1887.".

The diversity of the citizenship of plaintiff and defendant is thus fully disclosed.

"November 7th, 1887, the defendants preferred a petition for the removal of the cause to the United States Circuit Court within and for the Northern District of Iowa on the ground of diverse citizenship, and the case was transferred accordingly."

This shows that the petition for removal was filed by the defendants who were all residents of the State of Illinois, the state in which the suit was brought.

"The petition stated that the controversy in said suit is between citizens of different states, and that the petitioners were at the time of the commencement of this suit, and still are citizens of the State of Illinois, and that all the plaintiffs were then and still are citizens of the State of New York. Under the Act of Congress March 3, 1887, (24 Stat. 8 52 Ch. 373) it is the defendant or defendants who are non-residents of the State in which the action is pending, who may remove the same into the Circuit Court of the United States for the proper district.

The defendants here were not entitled to such removal, and the decree which was in favor of the complainants, and from which the defendants prosecuted this appeal, must be

reversed for want of jurisdiction, with costs against the appellants, and the cause remanded to the Circuit Court with directions to render judgment against them for costs in that court, and to remand the case to the State Court. (Torrence vs. Shedd 144 United States, 527-533.)"

As this case was brought after the Act of March 3, 1887, it was necessary before the cause could be removed, that it must be one 'of which the Circuit Courts of the United States are given original jurisdiction' that is a suit of a civil nature at common law or in equity.

In the case of Martin vs. Snyder, 148 United States 662, the Circuit Court of the United States had original jurisdiction; that is had the complainants who were residents of New York, elected, they could have brought their suit originally in the United States Court against the defendants who were residents of the State of Illinois. This fact, however, appears to be of no moment in determining whether the cause on removal was one that the Circuit Court acquired jurisdiction. The principal announced in this case must control the answer to the fourth question.

Notwithstanding the defendants brought the case under the Removal Statute, to the Circuit Court, and invoked thereby its jurisdiction, this Court will not tolerate a jurisdiction of the Circuit Court in contravention to the specific requirements of Section Two of the Act of 1887.

In the case at bar, the plaintiff in error did not invoke the jurisdiction of the Circuit Court. As it was compelled to do it defended its rights in such court, but raised no jurisdictional question.

"If the question is not as to any mere defect or informality in the proceedings, but goes to the substantive right of removal—in other words, the jurisdiction of the Federal Court, the rule is altogether different. Such objections cannot be waived by a party, nor can his consent confer on the Federal Court a jurisdiction which it would not otherwise possess. Blacks Dillion on Removal of Causes, Section 65."

In Parkinson vs. Barr, 105 Federal Reporter, 81-83, District Judge Hawley held:

"The question to be discussed is the question of the removal of this cause from the State Court by plaintiff upon the ground that the parties are residents and citizens of different states, unless it clearly appears that the defendants who join in the petition for removal are non-residents of the state where the suit is brought.

This question is important. It involves a construction of the provisions of the Removal Act of 1887-88."

In discussing this same Act, the Circuit Court of Appeals Eight Circuit, Thurber vs. Miller 14 C. C. A. 432, held "This Act restores the rule of the Judiciary Act of 1789, as relates to the party who made the removal, by restricting the right of removal 'to the defendant or defendants' under this Act; a plaintiff who commences a suit in a State Court cannot afterwards remove it; he is bound to remain in the forum of his own selection."

We again quote from the same opinion:

"The intention of the Act of 1887 is to confine the right of removal in all cases to defendants who are non-residents of the state in which they are sued. The plaintiff when he sues in the State Court, having selected that forum, must remain there, whether he be a citizen of that or some other State. The defendant who is sued can only remove the suit when it is brought in a state other than that in which he resides. This in the language of Chief Justice Fuller, in Fisk vs. Henarie, Supra., is a "return to the Standard of the Judiciary Act of 1789. Concerning which Mr. Rawle says:

"If a citizen of another state has commenced the suit, he cannot afterward remove it, for he is bound by his own selection, nor can the defendant remove, for he is not to be apprehensive of the injustice of the courts of his own state. (Rawle Const. C. 25, page 223)."

Again we quote from the same opinion:

"It is obvious therefore, that the Act of 1887 so far at least, as relates to the removal of suits on the ground of a separable controversy, intended to return to the rule of the Act of 1866, which first gave the right and limited it to the defendant who is a citizen of a state other than that in which the suit is brought."

To answer the fourth question contrary to our contention

is to say that a plaintiff non-resident may transfer a cause from the state to the Circuit Court because there is diversity of citizenship and because the cause is one that could have been brought originally in the Circuit Court; that a failure of the defendant to ask that the cause be remanded, is a waiver of a modal matter and thus there is created a new class of cases for the Circuit Court.

Federal Courts possess no purisdiction, but what is given them by the power that creates them, and can be vested with none but what the power ceded to the general government will autorize them to confer. United States vs. Hudson, 7 Cranch, 32.

Congress may withhold from any court of its creation jurisdiction of any of the numerous controversies. Courts created by statute can have no jurisdiction, but such as the statute confers.

Sheldon vs. Zill 8 *How.* 441.

It is for Congress to say how much of the judicial power of the United States shall be exercised by the subordinate courts it may establish from time to time. Plaquemines Tropical Fruit Co. vs. Henderson 170 United States, 511.

"A Circuit Court, however, is of limited jurisdiction and has cognizance not of cases generally, but only of a few specially circumstanced, amounting to a small proportion of the cases which an unlimited jurisdiction would embrace. And the fair presumption is not, (as we regard a court, of general jurisdiction; that a cause is within this jurisdiction unless the contrary appears), but rather that a cause is without its jurisdiction till the contrary appears. This renders it necessary inasmuch as the proceedings of no court can be deemed valid, further than its jurisdiction appears or can be presumed and setting forth upon the record of a Circuit Court, the facts or circumstances which give jurisdiction either expressly or in such manner as to render them certain by legal intendment.....if as in the present case the suit be upon a promissory note by an assignee to show that the original promisee is so; for by special provision of the statute, it is his description as well as that of the assignee which effectuates jurisdiction."

Turner vs. Bank of North America, 4 *Dall*, 8.

It is the *description* of the party who may transfer to Federal Court under Act of 1887-88 which "effectuates jurisdiction."

VII.

THERE IS NO ELEMENT OF ESTOPPEL AGAINST THE MASON CITY & FORT DODGE R. R. CO., PREVENTING IT FROM INSISTING THAT THE CIRCUIT COURT WAS WITHOUT JURISDICTION ON REMOVAL UNDER THE STATUTE OF 1887-88.

Fourth Question:—

The case was not brought in the Federal Court by the plaintiff in error, but was brought by the defendant in error, the non-resident land owner.

"The acts of a party sought to be made the basis for an estoppel must be viewed in the light of the understanding he had of his rights, and not in the light of such rights as they may thereafter be determined.

City of Cleveland vs. Cleveland & R. Co. 93, Federal Reporter, 113-125-131.

A party asserting the estoppel must show affirmatively that he has acted in reliance on the act or declaration and will be prejudiced of the truth is disputed. Malloney vs. Horen, 49 New York 11; Seekels vs. Norman, 71 Iowa 265-267.

To constitute an estoppel in pais, there must be a false representation, or concealment of known material facts, made to a party ignorant of their truth or falsity, and made with the intent that the latter party should act upon them, and he must have so acted.

Blodgett vs. Penn. 97 *Mo.* 263.

Barry vs. Wheeler, 128 *Mo.* 84.

To constitute an estoppel in pais, the party claiming the benefit of it must show that he acted in reliance on the acts of the one sought to be estopped, and without other knowledge of the facts, or means of acquiring such knowledge.

Smith vs. Trammel, 68 *Iowa* 488-490.
Ficher vs. Johnson, 106 *Iowa*, 181-187.

"No principle is better settled than that a party is not estopped by his silence, unless it has misled another to his hurt.

Held vs. Epperly, 31 *Pennsylvania*, 334.
Philadelphia Wilmington & Baltimore R. vs. DuBois, 79 *United States* 47, 12 *Wall.* 47.

It is essential to the application of the doctrine of estoppel that the party claiming to have been influenced by the conduct or declarations of another, was himself not only destitute of knowledge of the true state of the title, but also with no convenient and available means of acquiring such knowledge. Where the condition of the title is known to both parties, or both have the same means of ascertaining the truth, there is no estoppel.

"An estoppel in equity may arise if one person is induced to act prejudicially to himself in consequence of the acts or declarations of another, on which he had a right to rely."

Branson vs. Wirth 17 *Wall* 33.

VIII.

THE ADJUDICATIONS IN WHICH ONE IS HELD ESTOPPED FROM DENYING THE JURISDICTION OF THE FEDERAL COURT ARE THOSE IN WHICH THE PARTY WHO DENIES THE JURISDICTION INVOKED THE ACTION OF THE FEDERAL COURT, AND RELATE TO CASES IN WHICH THE DEFECTS ARE NOT TRULY JURISDICTIONAL, AS DEFINED IN SECTION 2, OF THE ACT OF 1887-88.

Fourth Question:—

In the case Baggs vs. Martin, 179 U. S., 205, it was held that removal into the Federal Court by a receiver appointed by it, of an action pending against him in the State Court, constitutes a waiver of any right he may have had to

have the matter decided by the state tribunal, but was not an attempt to confer jurisdiction by consent, since the Federal Court has jurisdiction either exclusive or concurrent of an action against a receiver it has appointed, and therefore such removal estops him from thereafter contesting the right of the Federal Court to determine the case.

The receiver who afterwards contested the jurisdiction of the court, brought the case to the Federal Court on his application of removal. We quote the following from the opinion.

"We do not mean to be understood to say that mere consent or even voluntary action by the parties can confer jurisdiction upon a court which would not have possessed it without such consent or action.'

'Again:

"But here the Circuit Court had independently of the citizenship of the parties in the damage suit, jurisdiction over the Railroad and its property in the hands of its receiver.....but when the receiver waiving any right he might have had to have his cause tried in the State Court, brought it before the Court whose officer he was, he cannot successfully dispute its jurisdiction. The claim was against him as a receiver, and if successfully asserted would affect the property of the Denver City Railroad Company, which was in course of administration by the Circuit Court of the United States for the benefit of its creditors, among whom were the defendants in error. First, then, the cause of action arose out of the alleged misconduct of the receiver, or his agents, for whom he was responsible, and as the property to be affected was in the exclusive control of the Circuit Court that court plainly had jurisdiction to entertain and determine the controversy, whether that jurisdiction was invoked by the parties seeking redress or as in this case, by the receiver."

In the case of Giles vs. Harris, 189 United States, 475, a question arose whether it was necessary to make an allegation, where a party asked redress for political rights, that the value of such right and privilege exceeds the sum of Two

thousand dollars. The majority of the Court speaking through Mr. Justice Holmes, said:

"But assuming that the allegation should have been made in a case like this, the objection to its omission was not raised in the Circuit Court, and as it could have been remedied by amendment, we think it unavailing. The certificate was made *alio in tuitu*. There is no pecuniary limit on appeals to this Court under Section 5 of the Act of 1891, Ch. 517, 26 St. A. 828, United States (Comp. Stat. 190 1 P. 549) The Paquette vs. Havana, 175 United States 677-683; and we do not feel called upon to send the case back to the Circuit Court in order that it may permit the amendment. In Rose vs. Green, 159, United States, 651, no notice was taken of the absence of an allegation of value in a case like this."

In the case at bar no amendment could cure the defect; it was not a failure to make an allegation, but the cause was removed on the petition of a party forbidden by law to secure such removal. The description of the party who made the removal did not bring the case within the class.

The minority oponion of Mr. Justice Harlan in Giles vs. Harris collects the authorities of this court showing that as the Circuit Court was a court of limited jurisdiction there is a presumption that it has not jurisdiction in a particular case, unless such jurisdiction is affirmatively disclosed. The presumption is that a cause is without the jurisdiction of the Federal Court unless the contrary appears. Turner vs. Bank of North America, 4 Dallas, 8. Brown vs. Keen 8 Peters, 115. Ex parte Smith 94 United States 455. Robertson vs. C. C. A. S. E., 97 United States 646; Mansfield C. L. & M. R. Co. vs. Swan, 111 United States 378-382 Mattingly vs. N. W. Va. R. Co. 158 United States 57; Parker vs. Ormsby 141 United States 83; Chapman vs. Barney, 129, United States 677-681; Metcalf vs. Watertown, 188, United States 587; Cambridge Co. vs. Otoe City 129, United States 226; Harris vs. Watson 113 U. S. 505-598.

In the case of Fichet vs. Shropsshire, 147 United States

133 in an opinion written by Chief Justice Fuller, it was held:

"The Circuit Court should not be deprived of jurisdiction at the suggestion of the party who voluntarily invoked it."

The jurisdiction discussed in this case relates to the powers of the Federal Court of equity in dealing with necessary or proper parties to an action, and did not involve the construction of the truly jurisdictional question involved in Section Two of the Act of 1887-88.

That this is true, is shown by following quotation:

"If George Lyle who was fully aware of the pendency of the suit and gave his testimony therein, desired to set up equities which he claimed arose from the payment of part of the purchase of the property before the suit was brought, he might as pointed out by the Circuit Court, have intervened in the cause, for the protection of his rights, without ousting the jurisdiction. This he did not do, and we are not prepared to hold the Circuit Court to be deprived of jurisdiction at the suggestion of the party who voluntarily invoked it. Undoubtedly George Lyle would have been a proper party to the proceeding, but we do not regard the case as one in which his interest in the subject matter and in the relief sought, was so bound up with John Lyle that his legal presense as a party was an absolute necessity without which the Court could not proceed."

In Cowley vs. Northern Pacific Railroad Company, 150 United States, 560, this statement is found in the opinion of the Court written by Mr. Justice Brown:

"The case having been removed to the Circuit Court upon the petition of defendant, it does not lie in its mouth to claim that such Court had not such jurisdiction of the case, unless the Court from which it was removed, had no jurisdiction."

The jurisdiction here discussed is whether Federal Courts may in equity deal with new rights and privileges created by the statutes of the State of Washington, which establishes a special proceeding in its courts therefor. We say that this question is not a truly jurisdictional question

such as involved under Section Two of the Removal Act.

The Circuit Court held that the remedy was at law; and not in equity; that was a decision that the Circuit Court had no jurisdiction as a court of the United States. Blythe vs. Hinckley, 173 United States, 501-506.

To the same effect is Huntington vs. Laidley, 176 United States, 668.

All of which is respectfully Submitted,

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 170.

MASON CITY AND FT. DODGE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

C. D. BOYNTON.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF AND ARGUMENT FOR C. D. BOYNTON.

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vs.

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ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FROM THE EIGHTH CIRCUIT.

BRIEF AND ARGUMENT FOR C. D. BOYNTON.

I.

The point being made, this court has no jurisdiction to decide the matters presented herein.

To give this court jurisdiction, it must appear by the record, affirmatively, that the circuit court of appeals had jurisdiction.

Mansfield *vs.* Swan, 111 U. S., 379.
Fruit Co. *vs.* Henderson, 170 U. S., 511.
Minnesota *vs.* Securities Co., 194 U. S., 48; 24 Sup. Ct. Rep., 598.

The jurisdictional facts must appear affirmatively, or it will be presumed that jurisdiction does not exist. It is not

enough that it might be inferred, argumentatively from averment of facts found in a petition for removal.

Fife *vs.* Whittell, 102 Fed., at 539.

The circuit court of appeals has no jurisdiction where the sole question presented to it is whether the circuit court had, as a Federal court, jurisdiction.

1 U. S. Comp. Stat. (1901), pp. 549-550.
Powers *vs.* Railroad, 169 U. S., 92.

This is so where questions other than jurisdiction are suggested, but suggested incidentally only.

Torrence *vs.* Shedd, 144 U. S., 527; 12 Sup. Ct. Rep., 726.

II.

Within the meaning of the Removal Act, this land owner was not a plaintiff, and no case holds that he is except Myers vs. Railway, 118 Iowa, 312, and Kirby vs. Railway, 106 Fed., 552.

The non-resident land owner may remove before he appeals to the State court from award made.

Railway *vs.* Day, 54 Fed., 545.
Traction Co. *vs.* Mining Co., 196 U. S., 249, 25 Sup. Ct. Rep., 377.

A.

While State laws, and decisions by State courts of last resort, may, as to litigants who remain in the courts of the State, settle, arbitrarily, who is plaintiff, neither a legislature or such courts may, directly or indirectly, abridge the right

to remove to the Federal court in a case of which that court has original, concurrent jurisdiction.

Hess *vs.* Reynolds, 5 Sup. Ct. Rep., 377.
Myers *vs.* Railway, 118 Ia., at 321.
Terminal Co. *vs.* R'y, 119 Fed., 209.
Searle *vs.* District, 124 U. S., 197, 8 Sup. Ct. Rep., 460.
Traction Co. *vs.* Mining Co., 196 U. S., at 249, 252, 254, 255, 256.
Reagan *vs.* Loan Co., 154 U. S., at 391.

What is removable in one State must be so in every other; and a State may not vary the standard of removability by making proceedings which affect the property rights of a non-resident unlike what suits usually are.

See citations last made.

B.

While the Federal courts will, in such cases as plaintiff in error cites, follow the decisions of the highest State courts, even where the soundness of such decisions is not approved, this rule does not apply to State decisions that directly or indirectly tend to abridge the jurisdiction of the Federal courts.

Cases last cited.

C.

While it has been settled that certain instances of seeking to increase an award are equivalent to beginning suit to obtain pay for land appropriated, this does not necessarily settle that every non-resident land owner who appeals from a condemnation award is a plaintiff within the meaning of the removal act, and the cases that so defined the beginning of suit did not, and had no occasion to, hold that such owner was such plaintiff.

If it may be claimed that some of the cases so defining

the beginning of suit do hold that the appealing land owner was a plaintiff, they do so on the theory that his appeal could not and did not present anything but the question of compensation.

D.

Under the statutes of Iowa such appeal could also present whether conditions existed which, under such statutes, warranted condemnation proceedings.

See certificate of C. C. A.

Terminal *vs.* R'y, 19 Fed., 209.

Under said statutes the condemnation at bar was sufficiently a judicial proceeding to make the one who instituted it, rather than the owner who appealed from the award, the plaintiff.

See certificate of C. C. A.

Traction Co. *vs.* Mining Co., 196 U. S., 241, 242, 243, 244, 248, 249, 250, 251.

Boom Co. *vs.* Patterson, 98 U. S., at 404.

Searle *vs.* District, 124 U. S., 199, 200.

E.

Had the Iowa statutes done less than to make the proceedings on condemnation sufficiently judicial to allow a hearing on whether the right to condemn existed, and confined them to the mere right to have compensation ascertained, there would have been a denial of due process of law.

Traction Co. *vs.* Mining Co., 196 U. S., at 251, 252.

F.

While consent can not give jurisdiction, if one party assert the facts necessary to jurisdiction, they are not put in issue,

and a court competent to try the question whether jurisdiction exist, decides that it does, it is an adjudication that jurisdiction exists.

Judicial decisions can not create jurisdiction in the tribunal that decides it has it, but a court, competent to try the question of fact or law involved, can, by deciding that another court has jurisdiction, preclude inquiry into said jurisdiction unless the decision is directly attacked.

R'y *vs.* Daughtry, 11 Sup. Ct. Rep., 306.
Cable *vs.* R'y, 88 Fed., 803.
Council *vs.* Smiley, 15 Sup. Ct. Rep., 353.
Davies *vs.* Lathrop, 13 Fed., 565.
R'y *vs.* Ramsey, 22 Wall., 322.
Sims *vs.* Hundley, 6 How., 1.
De Sobrey *vs.* Nicholson, 3 Wall., 420.
Goodnow *vs* Burrows, 74 Ia., at 266.
Kirby *vs.* R'y, 106 Fed., 552.

G.

While it is true that the order of the State court granting a removal will not avail against conflicting action on part of the Federal courts, if such order is neither appealed from nor nullified by the court to which the removal is taken, such order of the State court, as against collateral attack, establishes conclusively that there was jurisdiction to remove.

Telegraph Co. *vs.* Griffith (Ga.), 30 S. E. Rep., 420.
Dillon's Rem. of Causes (5 ed.), 174.
Black, Dillon Rem., par. 191.
Removal Cases, 100 U. S., 474.
Stone *vs.* South Carolina, 117 U. S., 430; 6 Sup. Ct. Rep., 799.
Bank *vs.* Dodge, 42 N. J. L., 316.
Walker *vs.* O'Neil, 38 Fed., 374.
Goodnow *vs.* Burrows, 74 Ia., at 266.

III.

Assume that the non-resident land owner was plaintiff, and concede that a resident defendant cannot remove, and it does not follow, in all cases, that a removal by such non-resident plaintiff so leaves the court removed to without jurisdiction, that waiver and consent are of no avail.

That he cannot remove, if objection be made, is conceded. But that does not settle whether he may remove if objection be not made, or the removal consented to.

Removal neither adds to nor takes from jurisdiction. Every authorized removal presupposes jurisdiction to try the matter removed. Removal but sets that jurisdiction in motion. The jurisdictional elements required in the matter at bar are these and none other: First, a civil suit; second, more than $2,000 in controversy; third, diversity of citizenship.

That a party not named in the statute seeks to have the Federal court exercise its jurisdiction in such a case will warrant a remand on objection, but if the non-resident applies, that court does not lack power to try such suit.

1 U. S. Comp. St., pp. 508, 509.
Baggs *vs.* Martin, 179 U. S., 206; 21 Sup. Ct. Rep., 109.
Traction Co. *vs.* Mining Co., 196 U. S., 245, 246, 247, 251, 254.
Davies *vs.* Lathrop, 13 Fed., 565.
R'y *vs.* Lumber Co. 37 Fed., 3. (Brewer.)
Fales *vs.* R'y, 32 Fed., 672.
R'y *vs.* Davidson, 157 U. S., at 208.
Kohl *vs.* U. S., 91 U. S., at 375.
U. S. *vs.* Jones, 109 U. S., at 519.
Myers *vs.* Railway, 118 Ia., at 319.
Foulke *vs.* Gray, 120 Fed., 156.
Banks *vs.* Calhoun, 102 U. S., 256; 26 L. C. P., 101.
Goodnow *vs.* Burrows, 74 Ia., 251.

A.

We do not claim that this is true of removal by a resident defendant,—which is the case of Martin *vs.* Snyder, 148 U. S., 663.

The very spirit of the removal act excludes the resident defendant. He should not claim he fears his own courts. The removal act is not a change of venue statute. A resident defendant sued in the courts of his State by a non-resident cannot say, on removing, that he thus places a case in the Federal court which he might have put before its original jurisdiction. He has no case that he can put anywhere. He cannot sue himself, nor compel the plaintiff to sue in Federal court or in any other.

IV.

Assume that a removal by a non-resident plaintiff confers no jurisdiction on the Federal court, still where, as here, it is conceded by defendant in error that plaintiff could at one time have brought the very suit removed, originally, in the very court to which removal was attempted, it follows that, no objection being made, the abortive removal became an informal method of trying this suit as an original one in a court that had power to try such suit.

Citations under Point 3.

Davies *vs.* Lathrop, 13 Fed., 565.
Danforth *vs.* Thompson, 34 Ia., 243.
County *vs.* Ralls, 18 Ill., 29.
Miller *vs.* Hayes, 20 Ind., 452.
Wholsen *vs.* Anderson (Minn.), 55 N. W., 597.
Lee *vs.* Parrott, 25 Minn., 128.
Mackey *vs.* Briggs (Colo.), 26 Pac., 131.
Rhyne *vs.* Lipscombe, 122 N. C., 650.

A.

It is true that when the non-resident sues in the State court, that is an election which he cannot revoke, if there be objection; but who will claim that the existence of the defense of election destroys jurisdiction.

ARGUMENT.

I.

This record does not show affirmatively that this court has jurisdiction.

The certificate states that the main point presented was whether Boynton was the plaintiff. It submits nothing here but the question whether the circuit court had jurisdiction. It adds but one statement to this—that an assignment of errors was made challenging the sufficiency of the testimony to sustain the award made by the circuit court. It does not say that this assignment was argued or pressed. It is quite clear that defendant in error did not mean to go on with such an assignment. In its brief in the circuit court of appeals it abandoned that assignment, stating no relief could be had upon it, and that it was put in to show that court that there was some excuse for the raising of the question of jurisdiction. Jurisdiction is not presumed. It is not made out by argumentative deductions. The circuit court of appeals had no jurisdiction, if the sole point presented to it was whether the circuit court, as a Federal court, had jurisdiction. To review that, is exclusively for this court, on certification direct from the circuit court. That the circuit court of appeals had jurisdiction does not appear, affirmatively.

For it does not so appear that jurisdiction of the circuit court was not the sole question before the circuit court of appeals. By fair inference, it appears, instead, that jurisdiction was the *sole* question before the certifying court.

The first fundamental question is the jurisdiction of the court from which the record comes.

Mansfield *vs.* Swan, 111 U. S., 379.

That, whether the circuit court lacked jurisdiction, was *not* the sole question before the circuit court of appeals, is essential to the jurisdiction of the certifying court.

Vol. I, U. S. Comp. Stat. (1901), pp. 549-550.
Powers *vs.* Ry., 169 U. S., 92

Where in a bill for partition, its main object is the assignment of several shares to tenants in common, and in which the determination of conflicting or controverted title is merely incidental, a dispute as to title claimed in an undivided share is not such a separable controversy as would justify a removal

Torrence *vs.* Shedd, 144 U. S., 527 (12 Sup. Ct. Rep., 726).

The jurisdictional facts must appear affirmatively or else it will be presumed the jurisdiction does not exist. That it may be inferred argumentatively from any averment in the petition as to the facts is not sufficient.

Fife *vs.* Whittell, 102 Fed., at 539.
Fruit Co. *vs.* Henderson, 179 U. S., 511.

When the record does not affirmatively show jurisdiction of the circuit court, the supreme court must on its own motion assert and act on such want of jurisdiction.

State *vs.* Securities Co., 194 U. S., 48 (24 Sup. Ct. Rep., 598).

It is not overlooked that this court has power to determine this matter, had it reached it on certificate from the circuit court, instead of the circuit court of appeals. In a sense, the departure from the law is modal. It may be waived. But it is being objected to, and not being waived.

II.

This land owner is not a plaintiff within the meaning of the removal act.

THIS COURT HAS NEVER HELD SUCH AN ONE TO BE SUCH PLAINTIFF. WITH EXCEPTIONS TO BE NOTED, NO CITATION MADE BY PLAINTIFF IN ERROR SO HOLDS. DECLARATIONS BY THE HIGHEST COURT OF A STATE, THAT HE IS SUCH PLAINTIFF, ARE NOT OF THE CLASS OF DECISIONS WHICH ARE BINDING ON THE FEDERAL COURT.

The statutes of Iowa declare the appealing land owner is a plaintiff. *Myers'* case, 118 Ia., 312, holds that this enables a non-resident condemnor to remove after the owner has appealed from award. *Kirby's* case, 106 Fed., 552, takes the same view, but declares that the said statute declaration is not controlling in arriving at the conclusion reached. Upon this, plaintiff in error asserts:

> The true character of the procedure, the matter in issue, the relation each party bears to the controversy have all been determined by the decision of the State court of last resort, and this decision should be conclusive (page 30).

We do not question this as to any such decision to which the owner was a party; and it is the law for every citizen of Iowa and for all who remain in her courts. Nor is there any dispute over the general rule concerning the effect which the Federal court gives to decisions of the court of last resort in a State.

What is cited in the opposing brief, on this head, is good law. We but question its applicability, and the deductions attempted upon it.

In Point 2 (Plaintiff's Brief, page 5) it is said:

> "The Federal court will respect a construction placed on the condemnation statutes by the State supreme court. It becomes a rule of property."

Again, on page 23:

"The construction given by the State court is controlling, for it is the established doctrine of the United States courts that the decisions of the highest tribunal of the State will be followed in all matters pertaining to the construction of State statutes, and the decisions of the State court *respecting the condemnation of real estate establish a rule of property.*"

While there is no escape from it that this emphatically asserts every decision of a State court is binding *because* it establishes a rule of property, the citations made indicate the real claim—*i. e.*, that such decisions are thus controlling *when* they establish a rule of property. That, of course, we do not dispute. When it is all said, the cases adduced for this text, come to just this:

Traction Co. *vs.* Mining Co., 196 U. S., 250, does not in any way hold any such doctrine. Neither does Miss. Boom Co. *vs.* Patterson.

Bondurant *vs.* Watson, 103 U. S., 281 (26 L. C. P., 447), does not hold, that all construction of State statutes have force because the decision establishes a rule of property, but that decisions which establish such rule in the State are binding on the Federal court.

Lowndes *vs.* Watson, 153 U. S., page 1 (14 Sup. Ct. Rep., at 763), holds, that the definition of a boundary comes under this rule.

Gage *vs.* Pompelly, 115 U. S., 454 (6 Sup. Ct. Rep., at 139), holds, that where a decision of the highest court of a State establishes a rule of property concerning what is not a valid tax title, the Federal courts will follow that rule.

Hardin *vs.* Jordon, 140 U. S., 371 (11 Sup. Ct. Rep., 808) —Patents of the U. S. of land bounded by streams or other

waters, in the absence of reservation or restriction of terms, are to be construed, as to their effect, according to the law of the State in which the land lies.

Burgess *vs.* Seligman, 107 U. S., 20, 33 (2 Sup. Ct. Rep., 10), deals with a Missouri statute governing the status of stockholders of a corporation after dissolution. It is held:

While Federal courts have an independent jurisdiction in the administration of State laws between citizens of different States, concurrent with and not subordinate to that of the State courts, and are bound to exercise their own judgment as to the meaning and effect of those laws—Still, since the ordinary administration of the law is carried on by State courts, in which they finally establish decisions which become rules of property and action in the State, and have all the effect of law, such established rules are always regarded by the Federal courts as authoritative declarations of what the law is; especially with regard to the law of real estate and the construction of State constitutions.

And for the sake of harmony, the Federal courts will lean towards an agreement of views with the State courts if the question seems to them balanced or in doubt.

To this point, nothing has been produced but a perfectly well settled and seemingly irrelevant rule. Then comes:

Long Island *vs.* Brooklyn, 166 U. S., 685 (17 Sup. Ct. Rep., 718), that as to mere matters of procedure in condemnation cases, conflict between statutes and proceedings had thereunder, or conflict between State statutes and State constitutions, the supreme court of the State is conclusive.

In U. S. *vs.* Freeman, 113 Fed., 370, the holding is, that the statutes of the State of Washington respecting condemnation proceedings prescribe a special proceeding distinct from the practice in civil proceedings, and the provisions of the civil practice act authorizing courts in which actions are tried to set aside verdicts for error in assessment of damages are not applicable, and do not authorize the same courts to grant new trials in condemnation cases; and that the Federal court will follow the State supreme court in so construing such statutes.

Where the whole proceeding was under the standing law of the State, and it was sanctioned on appeal by the supreme court of the State, a procedure thus authorized by law, and sanctioned, cannot, on a claim that there was a pretended exercise of eminent domain with a view to destroying a charter, be lightly regarded. It has all the solemnities of a sovereign act (West River Bridge Co., 6 How., 507).

U. S. *vs.* Morrison, 4 Peters, 124, applies the rule to the construction by the State court, that the right to take out an *eligit* is not suspended by suing out a writ of *fi. fa.;* and, consequently, that the lien of a judgment continues pending proceedings on that writ.

Bank *vs.* City, 189 U. S., 71 (23 Sup. Ct. Rep., 604), applies the rule to what effect a State judgment has as *res judicata.*

In Green *vs.* Lessee of Neal, 6 Peters, 291, the rule is applied to the construction by a State court establishing when possession of land creates the bar of limitations.

Leffingwell *vs.* Warren, 67 U. S., 599 (17 L. C. P., 261), holds, that Federal courts will follow the State construction of the statute of limitations.

Bucher *vs.* Ry., 125 U. S., 555 (8 Sup. Ct. Rep., 974), holds that federal courts will follow a construction that, under a given statute, no recovery may be had for injury received in traveling on the Sabbath.

What is the purpose of all this? The answer in the brief of plaintiff is, in effect, that the *Myer's case* rules that this defendant in error has no right to remove, and that the

decision so ruling *establishes a rule of property* (page 29). A denial, in the terms of the assertion, is a sufficient answer. A decision that an appealing land owner is a plaintiff, and may not have a removal, establishes no rule of property. Manifestly, it establishes, if it may, a mere rule of practice and procedure. That it will, ordinarily, be followed in matters of procedure is undoubted. But there is one well defined exception—cases where rules of procedure have or may have the effect of abridging that jurisdiction which the Federal courts do possess. Up to now, with all but one authority analyzed, not a word is said in the brief, on such abridgment. But there is one citation made on this point. On page 27 of appellant's brief, it is said:

"The authoritative character of the decision of the State court will be recognized, even where the effect is to prevent a case from being removed, which would otherwise be removable to the Federal courts."

The case of State *vs.* Railway, 3 Fed., 887, is alone given the burden of sustaining this novel contention. It holds:

Where the court of last resort construes a statute, which imposes a fine upon an employer, if he or those employed by him in operating a railroad, recklessly and negligently kill one not an employé, to be a penal statute, such construction will be followed, and suit brought under such statute be held not removable.

It is not easy to understand why this construction had the effect of making a case non-removable which was removable had it not been for such construction. Suits penal in nature are not removable. If no State court had spoken, a suit to recover the penalty fixed by such a statute as this would not have been allowed to remain in the Federal court. The suit was not removable, not because a State court said it was a penal one, but because it *was* a penal suit.

If such court should declare that a suit to foreclose a mort-

gage was penal, would the Federal courts, in deference, forbid its removal.

The construction of a statute makes no law. A decision which construes one is simply an authoritative statement of what the statute is. What the legislature may not do by enactment, the courts of its State may not do by construing an enactment. A State statute, that every party brought into its courts should be deemed a plaintiff for the purposes of the Removal Act, would not be respected by the Federal courts. A judgment by a State court of last resort, that such statute prevented a non-resident defendant from removing, could receive no treatment differing from that accorded the statute so construed. If the Federal courts are to have the right of self preservation, these statements are truisms. Surely, no such direct abridgment of Federal jurisdiction would be tolerated. No attempt to do the same thing by indirection is in better case.

Who is plaintiff or defendant, is or may be vital on any attempt to remove. Give the State power by legislative act, or judicial interpretation, to settle the status of litigants in suits brought into the State courts, to settle it conclusively by mere assertion of such status, by act or decision—and the State determines the jurisdiction of the Federal courts in every removal case when party status is an element in the right to remove. The Federal court would retain the barren power to say that a defendant could remove, and the State would settle who was a defendant. That the State may by legislative assertion and judicial construction arbitrarily fix such status for litigants who remain in its courts, may be conceded, and would, usually, be of no special consequence. It would ordinarily amount to little more than fixing the burden of proof, the order of testimony, and the right to open and close. But, to allow this where it would arbitrarily keep one in the State court, though the policy of the General Government deemed it right to give him a forum free from bias and maintained by a judiciary that, in

the nature of things, looked at the citizens of all States with the same regard—is simply unthinkable. Without the citation of an authority, this leads, inexorably, to but one logical result—no act and no assertion of any department of a State can deprive a citizen of the right of removal, if he in fact possess it. If one be not a plaintiff, the State cannot prevent his removing, by styling him plaintiff.

Party status is not more essential to removal than is the existence of a civil suit. It goes without saying that the State can no more prevent removal by declaring that a suit which is a civil one is not, than by asserting one to be a plaintiff who is a defendant, or declaring, arbitrarily, what amount is in controversy in such suit.

It is equally clear that what it may not do in suits, generally, it may not do by selecting some particular controversy, for instance, one growing out of the exercise, on delegation, of its eminent domain. That power is its sovereign attribute. The modes and details of its exercise are not. While appellant has, naturally, found it difficult to marshal any law against all this, it should not be, and is not, difficult to fortify my position with authority. The only difficulty arises because these positions have been rarely challenged.

That the State law terms the land owner, plaintiff, is not controlling on the question of removal.

Kirby *vs.* Ry., 106 Fed., 552.
Ry. *vs.* Day, 54 Fed., 545.

State laws cannot directly or indirectly abridge the removal jurisdiction of the Federal courts.

Hess *vs.* Reynolds, 5 Sup. Ct. Rep., 377.
Myers *vs.* Ry., 118 Ia., at 321.

The question whether condemnation is sought for a public use, is for the courts. This is so without regard to legislative assertion, that a use is a public one.

Terminal Co. *vs.* Ry., 119 Fed., 209.

It is not true that in no case can the judicial power of the United States be invoked until the question of taking be consummated by a proceeding in the particular local tribunal designated by the State.

Traction Co. *vs.* Mining Co., 196 U. S., at 255.

No State action can affect removal in cases originally cognizable in the Federal court. Under any other view a State could by its own tribunals, deprive citizens of other States of their property by condemnation without an opportunity to protect themselves in a national court against local prejudice and influence.

Traction Co. *vs.* Mining Co., 196 U. S., at 254.

The circuit court will respect the sovereign power of a State and define the legitimate public purposes for which private property may be taken, upon compensation to the owner being made or secured. But, at the same time, it must enforce the authority of the supreme law of the land as to cases where the circuit court is given jurisdiction over the controversy. *A State cannot, by any statutory provisions, withdraw from the cognizance of the Federal courts a suit in which there is such controversy, or else the judicial power of the United States therein would be defeated.*

Traction Co. *vs.* Mining Co., 196 U. S., at 253.

2.

THIS LAND OWNER WAS NOT, IN FACT, THE PLAINTIFF

Our research has found but three decisions in which this question has been squarely passed upon—and they do not agree. Ry. *vs.* Day, 54 Fed., 545, holds he is not a plaintiff. Myers *vs.* Ry., 118 Ia., at 321, and Kirby *vs.* Ry., 106 Fed , 552, both decided under an Iowa statute declaring the appealing owner to be the plaintiff, hold he is, also, plaintiff in fact. As has been said, the Iowa cases are not controlling, but they are none the less judicial decisions and entitled to whatever weight they carry for being sound and logical—just as though they were not pronounced by a court of the

State having said statute. But the time for analyzing them is not reached.

Many cases are cited by appellant which do not determine this point expressly. The support of the Iowa cases is the reasoning of these other cases, and they will be dealt with together. In essence, plaintiff in error puts the issue thus:

Removal requires a civil suit. The statutes of Iowa are so framed that land may be condemned and title changed by a proceeding which is not judicial and not a civil suit. After such condemnation nothing remains but the amount of compensation. This, either party may have determined by appealing from the inquest. The taking of such appeal, for the first time, begins a suit. If a non-resident owner appeal, that makes him a plaintiff in fact, and he cannot remove. But, after award and when nothing remains but to settle compensation, he may refrain from appealing, and sue originally in the Federal court, but as to nothing but the amount due him. If he, instead, appeal, he has made such an election of forum as that, if he afterward sue in the Federal court, that court is wholly without jurisdiction, though the condemner make no objection and agree to try that suit in that court, and it proceeds then to judgment without objection.

It is not denied that removals have been sustained for owners who had appealed. It is not denied that this would be allowed in the instant case if the statutes of Iowa had made provisions for condemning, like the statutes of the States from whose courts removal was sustained. The exact contention is, that the code of Iowa did, and had power to make the owner, in fact, a plaintiff, though it might have made him a defendant. The analysis of this position involves the whole question, whether this owner was, in fact, the plaintiff.

3.

It is conceded that removal is permissible, where the State creates proceedings to condemn which are, in any substantial sense, judicial proceedings, and that this is certainly

true where such proceeding permits investigation of the right to condemn, as well as compensation due.

Plaintiff's Brief, pp. 18-21.
Traction Co. *vs.* Mining Co., 196 U. S., at 250-251.
Same case, 130 Fed., 790.
Terminal R'y *vs.* R'y, 119 Fed., 209.

If the State statutes under which this was settled are, substantially, like those of Iowa, this question is determined. Of course, plaintiff in error insists that there are vital differences.

The said Federal cases were decided under statutes of Kentucky and Missouri, respectively. If I gather it correctly, appellant urges, in substance, that these differ from the Iowa statutes, in the following:

The one set of statutes provide for a hearing in court on the right to take *and* the compensation due. The Iowa statute concludes the taking without permitting any hearing on the right to condemn, the title passes as soon as the sheriff's jury makes award, and no judicial proceeding is provided save on the question of how much is due.

The statutes of Missouri, as construed, provide:

The petition to condemn may be lodged in the circuit court of the county, or before a judge in vacation, and summons issues. The question of the purpose of the use may be put in issue without regard to legislative declaration that any particular use is a public use. The right to condemn may be put in issue.

Brief of Plaintiff in Error, pp. 18, 19.
Terminal *vs.* Ry., 119 Fed., 209.

By setting out the statutes of Kentucky and those of Iowa in parallel columns, we can at once get a comparative analysis.

See Traction Co. *vs.* Mining Co., 196 U. S., at 241, 242.

KENTUCKY.	IOWA.
Any company authorized to construct a railroad, if "unable to contract with the owner for its (the lands) use for the purposes thereof."	If the owner of land necessary to be taken for either of the purposes named in this chapter refuses to grant the right of way required for such purposes, or if the parties cannot agree upon the compensation to be paid (1999).
Then the railroad may file in the office of the clerk a description and have commissioners appointed to assess the damages. These commissioners are appointed and shall make award in writing, and report to the clerk.	Then the sheriff, upon written application of either party shall appoint freeholders, who shall inspect, and ascertain the damages the owner will sustain by the appropriation, and report to the sheriff in writing (1999).
Upon application of the company, the clerk issues summons to the owner to show cause why the report should not be confirmed. At the first regular term after summons, the court must examine and pass upon the report. If exceptions are filed a jury may be had and judgment rendered on the verdict. Either party may appeal to and have trial *de novo* in the State circuit court.	Either party may appeal from the appraisement by giving "the adverse party" and the sheriff notice, and the court shall try the same as in an action by ordinary proceedings (2009). But no judgment shall be entered except for costs (2011).
Upon payment of the award confirmed, or sum assessed by the court, the railroad is entitled to take possession, for use for which land was condemned, as fully as if title had been conveyed.	An appeal does not delay "the prosecution of work upon said railway" if deposit is made with the sheriff of the sum awarded, which he retains until the determination of the appeal (2010).

If appeal is taken from the county court, possession can be taken only on payment into court of all damages assessed and costs.

No judgment save for costs is entered, and the company may decline to take the land. But it cannot enter on, use or control the premises, unless it pays or deposits, and may be ejected (2011-2012).

I am unable to see any real difference between the Missouri and Iowa statutes. Under one, the question whether property is wanted for a proper use, and compensation due are heard on summons, and by a court, in the first instance. Under the other, the right to condemn also depends on the use, and upon non-agreement with the owner. While, in Iowa, commissioners appointed by the sheriff act, to begin with, an appeal with trial *de novo* is provided; on that trial all the questions permitted in Missouri at the start, may be litigated in Iowa at the finish. If part of them may not be, the Iowa statute is void for denying due process of law. The real difference seems to be merely the point of time in a proceeding when the first court hearing is permitted. Be that as it may, the Terminal case but settles that the proceeding in Missouri is judicial. It does not attempt to hold that different ones would not also be judicial. If, then, there is no difference of substance between the Iowa statutes and those of Kentucky, and the latter create a proceeding which *is* a judicial one, then the Iowa statute creates such a proceeding, even if it differs from one in Missouri, which is confessedly, also, judicial.

In essence, plaintiff in error differentiates these thus:

In Iowa the title passes as soon as the award is deposited with the sheriff. In Kentucky, after a judicial hearing. That, therefore, no question but pay is involved in the Iowa appeal (Brief, pp. 17-18, 42, 43). In Kentucky the county clerk appoints the commissioners. In Iowa, the sheriff. In Kentucky there is no notice given until after the commissioners report. In Iowa, the notice is given to appear before the appraisers, before they act (Brief, 421).

Before this is proceeded with, it is well to remember that this court sustained the Federal jurisdiction, and right to remove, in the Kentucky case, though the removal was attempted *before any action was taken on the report of the commissioners.* At that time, no one should claim that the Kentucky procedure was more judicial than that in Iowa.

Traction Company's case, 196 U. S., at 242, 243, 244.

That commissioners appointed by a county clerk to make an award, on application filed with him, and report that award to him, whereupon the action of a court may, later, be had, is no more a judicial proceeding, before the court does act, than is the report of commissioners appointed by a sheriff, to the sheriff; such award being appealed from, but not yet tried *de novo* on such appeal.

If there be substantial differences, they are in favor of the claim that the Iowa proceeding is, *when begun,* the more judicial of the two. In Kentucky no notice is given before the award is made. In Iowa notice must be given to appear before the appraisers before they make award. This difference is pointed out by appellant, but its significance is misunderstood. To avoid the difficulty of a denial of due process, it points out, time and again, that the Iowa statute requires notice to the owner and gives him an opportunity to be heard. It goes so far as to urge that this notice was in fact given, a thing not found in the record before you (Brief, pp. 20, 29, 42). And, yet, it is contended that this notice is but an opportunity to be present when and where no hearing may be had—to be present at an inquest that has no single judicial attribute.

The statute distinctly recognizes that there is an adversative relation from the beginning. As said, it provides a notice of the time and place of the appraisal. Something was intended to be done by that notice. The statute starts with requiring the application of either "party" to the sheriff (1999). What is more persuasive, it declares that

appeal may be had by serving notice on the sheriff and "the adverse party." Mind you, this notice, of course, precedes the existence of the appeal, and if it is to be served upon "adverse parties," these cannot be created by the appeal, but must exist before the appeal does—a plain statutory declaration that there is an adverse relation between parties, before the appeal starts the controversy to a hearing before a court.

There seems to be no real dissimilarity between the procedure details of the compared State laws. In one, a clerk appoints commissioners, who report him an award made without notice, opportunity being given, on notice, to contest the report in court. In the other, the sheriff appoints appraisers, who report to him, and the owner is given opportunity to appear before they make award, and the right to have that award reviewed in court.

The claims that some questions which are for review in Kentucky are not reviewable in Iowa, and that the sheriff's jury passes title in Iowa, while the court does it in Kentucky, are not tenable, either.

In Kentucky the basis for ordering an appraisement can be filed, only, if filed by a company authorized to construct a railroad which is "unable to contract with the owner" for the use of his land for certain permitted purposes. In Iowa the sheriff appoints appraisers, only, if it is necessary for the railroad to take land for purposes named in the law, and if the owner refuses to grant, or an agreement as to pay cannot be had.

It will be noticed that somewhere, by some one, the following questions may arise for settlement in either State:

In Kentucky—Is the condemnor a company authorized to construct a railroad—Does it desire a permitted use—Is it unable to contract with the owner?

In Iowa—Is the condemnor a railroad—Does it desire land for purposes permitted by law—Does the owner refuse to grant—Can an agreement as to compensation be had?

Now, as to the passing of title:

In Kentucky the railroad has the use of the land after award is confirmed, upon payment of it.

In Iowa it has the right to work, though appeal be taken if it deposit the award. If the award is raised, the larger sum must be deposited to maintain possession. No judgment is entered, and the railroad may withdraw at any stage upon payment of costs, and it may be ejected at any stage if it fail to increase deposits should there be a change in award.

Why does title pass quicker in Iowa than in Kentucky? How can a title be said to pass when it may be taken for non-compliance with new requirements developed in pending litigation. How can title be said to have passed to one who may still refuse to take it. Can the railroad insist it has bought, while the owner has no right to insist he has sold. Why should it be claimed that here there is no question possible save the size of the award? Plaintiff in error practically concedes, that whether the use for which condemnation is sought is a public use, is always a judicial question (Brief, 22). To be sure, it states that Boynton has never attempted to contest any question but the amount of compensation due (Brief, 29). But there is nothing in the record before you to sustain this claim, either. I will not construe this into license to testify to the contrary. But I may submit my inferences upon the record which is here.

The certificate states:

"In his petition and bond to secure such removal the owner referred to and treated himself as the defendant," and the railroad company as the plaintiff in the case.

All men are presumed to know the law. If removal was authorized by urging several issues, which might be presented, and not authorized if but one of them was presented, it is fair to presume that the party desiring removal presented more than one of them; at any rate, the inference is stronger than a claim for which there is no record.

4.

I shall not attempt, now, to investigate the citations made in the opposing brief, for the claim, that the Iowa statutes prevent removal because they permit no review of any question but the award of compensation, the raising of which question makes the owner a plaintiff. I shall assume, for present purposes, that such is the state of the Iowa law. As has been said, if that is so because Iowa made statutes unlike those of Kentucky, then it would have been different had it elected, instead, to make laws like those of Kentucky. Which brings us, squarely, to whether a State has the power to make one law rather than another, and thus abridge the right of removal to the Federal courts.

While the two points have close relations, that a State cannot make a defendant into a plaintiff by naming him plaintiff (which I have tried to demonstrate), is not quite decisive of the one now being discussed. That point is, can a State elect to create actual conditions which must, so long as they are continued, and respected by the Federal court, abridge the jurisdiction of that court. Does the right to remove depend, in any case, upon what law a State chooses to make. Is there a right to remove from one State court, which does not exist as to a court in a different State, there being no difference in the case, and no difference in the status of the one seeking removal except a difference created by State law.

Here is a citizen and resident of Missouri. He has property in Iowa. Under sanction of Iowa law, an attempt is made to take it from him. It is conceded that the value involved exceeds $2,000, and that he has the right to enter the courts of the United States, at some time, in some way. It is conceded that he may enter by original suit confined to litigating the amount of compensation due him. It is asserted that this is all that the State permits to be litigated. He may not be heard in the State courts on whether his property is sought by one authorized to condemn; whether it is needed

for lawful use. He may have contracted the land to the condemnor for a fixed price, and can not oppose a condemnation proceeding which will result in a forced sale at a lower price, with privilege to litigate about it. More land may be sought than the statute authorizes. In spite of a statute that additional right of way may be not condemned without permission from the Board of Railroad Commissioners, he can not urge that no consent was given. The State limits him to review of the size of the award. That is not all. Until he appeals from the award, to a State court, there is, so it is said, no judicial proceeding pending. If he appeals, it is said, he becomes a plaintiff and can not have removal. He must, then, take his aforesaid single question into the Federal court and not appeal. Should he go there after appealing, he will be met with the defense that he went into the State court, and is concluded by his election. If he goes without appealing, he must take chances on litigation whether he did not assent to the award by not appealing.

If the State would but consent to letting him litigate the right to condemn, whether the condemnation law had been obeyed *and* the price due him, and require the taker to begin the taking in the clerk's office instead of the sheriff's, then the attempt of the other to take his land would be the beginning of a suit, and the appeal would be a continuation. It would take the matter into the State court, and it would be removable without doubt or danger.

Ordinarily, when the rights of a non-resident are invaded by means of setting any of the machinery of the State in motion, he can remove. In the instant case, if the State had made its own law different, that right would have existed. So it all comes to just this: By the making of a statute which would have surrounded this taking with due process of law, Boynton could have removed his case. By failure to make the statute so, he is to be confined to having nothing reviewed, except that he may, in the State court, or by instituting a risky suit in the Federal court, find out how much he is to

have for his land—taken without opportunity to test whether properly taken. At the expense of denying due process, the State so shaped it that this owner must either submit to the award or become a plaintiff with right to question nothing but the amount of compensation.

"In a condemnation proceeding the courts of Missouri act as in other trials at law. * * * It would therefore seem that if a non-resident's property is sought to be taken and subjected to a public use, as claimed by this plaintiff, he should be entitled, if he so elects, to have a Federal court determine whether or not the conditions upon which the local laws authorize his property to be condemned, have been fairly and fully complied with, because by the statute the local court is empowered to hear and decide such questions as between a local corporation and a citizen of the State. * * * When the case has been removed into the Federal court it can and should pursue the course of procedure in the trial of the issues, and the appointment of commissioners, as prescribed by the local statute."

Terminal Ry. *vs.* Ry., 119 Fed., at 217.

It is said that when it is proposed to take private property for public purposes, the question of appropriation is one primarily and exclusively for the State to determine. *It is fundamental that private property cannot be taken by any government excepting for purposes which are of a public character, although such taking be accompanied by compensation.* If the purpose be public, the taking may be outright, provided reasonable, certain and adequate provision is made at the time of appropriation to ascertain and secure the compensation to be made to the owner. *Any State enactment in violation of these principles is inconsistent with the due process of law prescribed by the Fourteenth Amendment.* The legislature is not beyond the control of the courts in exercising the power of eminent domain, *either as to the nature of the use, or the necessity of the use of any particular property,* for if the use be not public, or no necessity for the taking exists, the legislature cannot authorize the taking of private property against the

will of the owner, notwithstanding compensation may be required.

Traction Co. *vs.* Mining Co., 196 U. S., at 251, 252.

A State cannot, by any statutory provision, withdraw from the cognizance of the Federal courts a suit in which there is such controversy, or else the judicial powers of the United States therein would be defeated.

Traction Co. *vs.* Mining Co., 196 U. S., at 255.

In Railway *vs.* Jones, 29 Fed. Rep., 193, the case was held to be removable, although the proceedings for condemnation were somewhat different from those in an ordinary trial, and it was said:

"I do not suppose that a State can, *by making special provisions for the trial of any particular controversy, prevent the exercise of the right of removal.* If there was no statutory limitation the legislature could provide for the trial of many cases by less than a common law jury, or, in some other special way; but the fact that it had made such different and special provisions would not make the proceeding any the less a trial or such suit as, if between citizens of two States, could be removed to the Federal courts. *If this were possible, then the only thing the legislature of a State would have to do to destroy the right of removal entirely, would be to simply change and modify the details of procedure.*"

Traction Co. *vs.* Mining Co., 196 U. S., 249.

The fact that the Colorado statute provides for the ascertainment of damages by a commission of three freeholders, unless at the hearing the defendant shall demand a jury, does not make the proceeding *from its commencement* any the less a suit at law. It is an adversary judicial proceeding from the beginning. *The appointment of commissioners to ascertain the compensation is only one of the modes by which it is to be determined.* The proceeding is, therefore,

a suit at law from the time of the filing of the petition and the service of the process upon the defendant.

Searl *vs.* The School District, 124 U. S., 199, 200 (8 Sup. Ct. Rep., 460).

Traction Co. *vs.* Mining Co., 196 U. S., at 248, 249.

Speaking generally, it is for the State primarily and exclusively to declare for what local public purposes private property within its limits may be taken upon compensation, as well as to prescribe the mode in which it may be condemned and taken. But the State may not prescribe any mode of taking private property for a public purpose and ascertaining the compensation, which would exclude from the jurisdiction of the circuit court a condemnation proceeding which, in its essential features, is a suit involving a controversy between citizens of different States. A State cannot tie up a citizen of another State having property rights within its territory, invaded by unauthorized acts of its own officers, to suits for redress in its own courts.

Reagan *vs.* Loan & Trust Co., 154 U. S., 362, 391.

Traction Co. *vs.* Mining Co., 196 U. S., at 252, 253.

If the Judiciary Act of Congress admitted of the case in the county court being brought within the original cognizance of the circuit court, that is an end of the matter, although it be a case of the appropriation of private property to public uses under the authority of the State. *Under any other view, a State, by its own tribunals, could deprive citizens of other States of their property by condemnation, without giving them an opportunity to protect themselves in a national court against local prejudice and influence.*

Traction Co. *vs.* Mining Co., 196 U. S., at 253, 254.

Ry. *vs.* Meyers, 115 U. S., 1 (5 S. C. Rep. 1147), holds that the taking of appeal after inquest does not make application for removal come too late.

It is not true that in no case can the judicial power of the United States be invoked until the question of taking is

consummated by a proceeding in the particular local tribunal designated by the State. In the exercise of the power given the circuit court, that court, while sitting within the limits of a State and having jurisdiction of the parties, is, for every practical purpose, a court of that State. Compensation is not the only thing it can determine.

Traction Co. *vs.* Mining Co., 196 U. S., at 255.

It is not true that the time to remove was after appeal was taken to the State circuit court, where it could be tried *de novo*. The right of removal was perfect whenever there arose a controversy between citizens of different States. Even after appeal to the circuit court the condemning party was, under the Kentucky statutes, entitled to pay into court the damages assessed in the county court, and before the case was concluded in the circuit court to take possession of the land and oust the owner. Clearly the owner was not bound to wait until the proceedings in the county court were concluded, or until he was out of possession, before exercising his right of removal, if the case was a removable one.

Traction Co. *vs.* Mining Co., 196 U. S., 256.

Whenever a right is given by the law of a State, and the courts of such State are invested with the power of enforcing such right, the proceeding may be removed to a Federal court if the other requisites of removability exist.

25 Fed. Rep., 520.

Traction Co. *vs.* Mining Co., 196 U. S., 250.

5.

The time has come to investigate what there is on the other side of this.

The first has no applicability. The second and third certainly are no great help to the position of appellant.

Reisner *vs.* Strong, 24 Kan., 297, has no applicability whatever to this point. It holds, that where a land owner

resorts to appeal from award, this is an election of remedies so that he may not at the same time, in the courts of the same State, enjoin the taking, on the ground that there is no power to take.

Sigafoos *vs.* Talbot, 20 Ia., 214, holds, that one whose land has been taken for a highway may appeal to the district court and have the question as to the amount of damages he is entitled to tried by jury.

Rogat's case, 4 Ia., 343, holds that where no appeal is allowed, the owner may enjoin the taking of his property until just compensation has been ascertained and paid.

The suit was, as already said, a judicial proceeding, initiated in a tribunal which constitutes a part of the judicial establishment of Kentucky as ordained by its constitution, and the court, although charged with some duties of an administrative character, is a judicial tribunal and a court of record.

Traction Co. *vs.* Mining Co., 196 U. S., at 251.

So far as material, the last but holds that special procedure provisions will not oust the Federal jurisdiction.

The case of Boom Company *vs.* Patterson, 98 U. S., 403 (25 L. C. P., 206), upon which appellant lays the utmost stress, is really rather embarrassing to its position. It claims for the case that it establishes the proceedings prior to appeal to be non-judicial, and that the appeal is the beginning of suit.

It will be remembered that its main differentiation of the Iowa and Kentucky statutes is that the condemnor starts by having a court (in fact, it is the clerk) create the appraisers, while in Iowa this is done by the sheriff. Now, if *Patterson's* case is authority for holding that all prior to appeal is not a suit, it is rather hard on that statement of difference.

For *Patterson's* case deals with a Minnesota statute which provides:

The corporation may take private property by applying to the *District Court of the county for the appointment of commissioners to appraise its value, and take proceedings for its condemnation.* The law is framed so as to give proper notice to the owner of the land to secure a fair appraisement of its value. If the award should not be satisfactory to the company, or any one claiming an interest in the land, an appeal may be taken to the District Court where it is to be entered by the clerk "as a case upon the docket" of the court, the persons claiming an interest in the land being designated as plaintiffs and the company seeking condemnation as defendant. The court is then required to "proceed to hear and determine said case in the same manner that other cases are heard and determined in said court." Issues of fact arising thereon are to be tried by a jury unless waived. The assessment by court or jury *to be entered as a judgment against the company,* which is subject to review by the State Supreme Court on writ of error.

The case holds the following and no more:

The power to take private property for public use is the exercise of a sovereign right of eminent domain possessed by the State. The United States, a separate sovereignty, has no right to interfere with this by any of its departments, and cannot investigate the necessity or expediency of an appropriation, judicially.

But notwithstanding this, when the sovereign power attaches conditions to its exercise, whether the conditions have been observed in the proper manner is for judicial cognizance. If that inquiry take the form of a proceeding before the courts, the owners of the land on one side and the one seeking to appropriate on the other, there is a controversy which is subject to the ordinary incidents of a civil suit, and its determination derogates in no respect from the sovereignty of the State.

The proceeding before commissioners appointed to appraise the land is in the nature of an inquest to ascertain value, and is not a suit at law in the ordinary sense of the term. But when it was transferred to the district court by appeal

from the award of the commissioners, it took, under the statute of the State, the form of a suit at law, and was thenceforth subject to its ordinary rules and incidents. The only point in issue or open to contest was the compensation to be made to the owner—In other words, the value of the property taken. The case would have been in no essential particular different had the State authorized the company by statute to appropriate the property in question and the owners to bring suit against the company in the courts of law for its value. Such a suit could be transferred if the controversy were between citizens of different States; the same is true of the pending proceeding after removal to the district court.

At the time it was decided, the statute permitted either plaintiff or defendant to remove, and the removal by the land owner was upheld. Hence, it was immaterial to decide whether the land owner was plaintiff or defendant, and was not decided.

It will be noticed that the statute it deals with provides for entering judgment against the company, on appeal. That enabled the decision to hold that the title passed on the award, and that under such a statute the appeal involved nothing but the amount of compensation due. The railroad could not decline to take it, as it can in Iowa. The sale was made, if the statute is valid, when the award was. There was bound to be a judgment for purchase price in some amount. The question whether the statute was valid, and whether removal could be interfered with by keeping the statute in that shape was not mooted. Indeed, it was not necessary to pass on it. For, as said, while the result was to make the owner a plaintiff, that did not affect removal, because, then, a plaintiff could remove as well as a defendant.

But what the *Patterson* case says could be said as well of the Kentucky statute under which the *Traction* case upholds removal, as of the Minnesota statute with which the *Patterson* case deals. If the Minnesota inquest, so called, was nonjudicial, so was the Kentucky procedure at the time when

removal was attempted. The *Traction* case is later. It was decided when there *was* a difference between a plaintiff and a defendant. In view of the last case, the first should not be allowed to declare the Iowa procedure non-judicial.

Simply following the *Patterson* case, and without disclosing the Kansas statute, it is said in Ry. *vs.* Myers, 115 U. S., at page 18:

> In Kansas, a proceeding before a mayor of a city and a jury to take land for widening a street and to ascertain the value of the land taken, and to assess the cost thereof on the property benefited, is not while pending there a suit at law within the meaning of acts of Congress authorizing the removal of cases; but it becomes such a suit at law when transferred to the circuit court of the State on appeal.

Ry. *vs.* Butts (Kan.), 41 Pac. Rep., 948, simply applies Boom Co. *vs.* Patterson in defining the status of inquest and appeal to the district court. Ry. *vs.* Orr, *idem*, 280, applies the Butts case literally.

Gaines *vs.* Fuentes, 92 U. S., 20 (23 L. C. P., 526), (approved in Boom Co. *vs.* Patterson) was a proceeding to annul a will probated in a State court as a muniment of title and to restrain the enforcement of a decree admitting it to probate.

It was there held:

That a controversy between citizens is involved in a suit whenever any property or claim of the parties, capable of pecuniary estimation, is a subject of litigation and is presented by the pleadings for judicial determination, and may be transferred to and tried in the circuit court.

The proceedings in the district court were entitled, Owen *vs.* The Railway. Plaintiff in error moved to dismiss because the case was wrongfully entitled. If true, this was no case

for dismissal; only to correct the title of the action. But we think the case was rightly entitled.

Railway *vs.* Owen, 8 Kan., at page 276, paragraph 2.

Turner *vs.* Holleran, 11 Minn., 253, simply decides that on appeal by the owner nothing but the question of damages to be allowed is involved.

If, that the question of compensation is before the appraisers gives the Federal court jurisdiction, that they also consider the necessity for the taking does not affect the right to remove.

Traction case, 196 U. S., at 250.

It is true the *Myer's* case, 118 Iowa, 315, says that from the statute it plainly appears that the proceeding before the commissioners is not a suit at law, but in the nature of an inquest to ascertain the value:

"No hearing is had and no evidence introduced. The commissioners must inspect the land and determine upon the amount of damages which will be occasioned by the appropriation, and make a written report to the sheriff. Thus far, then, the proceeding is in no respect a suit."

It also says that, on appeal, nothing is reviewed but the amount due; also that the company appropriates the right of way as soon as it pays the assessment.

In *Kirby's* case, 106 Fed., 552, it is said:

The fact that the State statute says the land owner shall be plaintiff and the corporation defendant, is not controlling, but the land owner is actually the plaintiff, because the State court is the first tribunal in which effect can be given to the provisions that the rights of trial by jury shall remain inviolate, and that other provision, that private property may be taken for public uses as soon as damages shall be assessed by a jury.

I rejoice that these cases do not control because enounced by Iowa courts, and that they must be weighed intrinsically. Both overlook that a State cannot by omitting provisions, or making such as destroy the character of a suit for a proceeding, interfere with the Federal jurisdiction. Arranging for less than a common law jury will not avail (*Traction* case, 196 U. S., at 249). This is overlooked in Kirby's case.

As for *Myer's* case,—I am unable to see why no evidence can be introduced before the appraisers. If it is so, why does the statute provide for notice to the owner? It does not seem to be clear, either, why under the Iowa statute the court should not inquire into the right to condemn. It certainly is not clear that the company gets title to the right of way as soon as it pays the award. If anything is clear, it is not bound to take the land even after appeal is tried, and that it may be ousted if it does not keep on depositing. At any rate, neither case passes on the question whether removal can be stopped by such statutes as they claim exist.

In re Railway, 94 N. Y., at page 294, it is said:

> Where the company appeals from the award because it is dissatisfied with the amount awarded, this is a continuation of the proceeding instituted by it to ascertain the compensation payable to the land owners, and to acquire their lands against their will—so held for the purpose of awarding costs.

True, it is said of appeal by the railroad. But what of that. If an appeal by either is a *continuation* of the proceedings instituted, and appeal is a suit, there was a suit for the appeal to continue.

6.

There is another reason why Boynton should be held to be entitled to remove.

In his petition and bond he dealt with himself as defendant. The District Court of Iowa, to whom he addressed his application for removal, granted it. The Federal court en-

tertained it. I contend that this is an adjudication by the State court that the Federal court had jurisdiction on removal.

Not that any court can create jurisdiction in itself by so deciding, but that the existence of jurisdiction, whether a question of fact or law, is triable somewhere, and there concluded, no matter how erroneously decided. While a court may not decide itself into jurisdiction, any final decision by one court having power to pass on whether another has jurisdiction, is conclusive on that particular jurisdiction of that other. It was asserted in the Circuit Court of Appeals that the Circuit had no jurisdiction. Suppose there had been a decision that jurisdiction existed; suppose this was an error; suppose that a case just like it reached here, and this court held there was no jurisdiction—could this appellant then enjoin the enforcement of this judgment which had been sustained by the Circuit Court of Appeals?

The real question is the status of the decision by the State district court.

That it is not final is conceded; that on conflict with a decision on the point by the Federal court, the latter controls, is not doubted. But that does not solve the matter. What is the State decision when there is neither appeal nor conflict? Hardly a nullity, to be collaterally attacked. *Myers'* case, on which appellant lays much stress, is an appeal from a district court decision. Appeals are not resorted to or entertained as to actions of a court which can have no finality or binding force. The exact question is, Can a granting of removal not appealed from, and concurred in by the tribunal having power to nullify it, be attacked collaterally. As said, that it was appealable and subject to a contrary view of the circuit court, is true, but not decisive. Very many decisions are subject to annulment, but are none the less final if not directly attacked.

Whether a case has been in fact removed, may be decided by the State court. If there is conflict the Federal court controls.

Bank *vs.* Dodge, 42 N. J. L., 316.

The decision of a State court granting a removal is a final decision, in the sense that it may be reviewed in the State supreme court, and granting removal is the final disposition of the matter in the State court. And it has a right to determine judicially whether it ought to surrender its jurisdiction.

Telegraph Co. *vs.* Griffith (Ga.), 30 S. E. Rep., 420.
Dillon, Rem. Causes (5 ed.), 174.
Black's Dillon, Rem., par. 191.
Removal Cases, 100 U. S., 474.
Stone *vs.* South Carolina, 117 U. S., 430 (6 Sup. Ct. Rep., 799).

Where defendant in good faith removes, and plaintiff acquiesces, plaintiff may not, after judgment, urge that one plaintiff was a citizen of the same State as defendant. His silence amounts to a stipulation that jurisdiction to remove existed.

Davies *vs.* Lathrop, 13 Fed., 565.

III.

While a resident defendant cannot give the circuit court jurisdiction by removal, it does not follow that it may not, on consent, try a cause removed by a non-resident plaintiff.

Martin's case, 148 U. S., 663 (13 Sup. Ct. Rep., 706), holds, simply, that *removal* by a resident defendant gives no jurisdiction. That is also the holding in Thurber *vs.* Miller, 67 Fed., 371. That is the effect of Fife *vs.* Whittell, 102 Fed., 537, decided, on direct attack, by motion to remand.

The same is the holding of Telegraph Co. *vs.* Brown, 32 Fed., 337, and of Weller *vs.* Co., 32 Fed., 860; also Parkinson *vs.* Barr, 105 Fed., 81.

It is said in Black's Dillon, Removal, section 65:

In proceedings for the condemnation of private property under the power of eminent domain, if the land owner assert his right to compensation on appeal from the award of damages, is to be regarded as the plaintiff (which may or not be the case according to the local practice), then he has no right to remove the cause to the Federal court.

This does not define how far his failure to have that right goes to jurisdiction. The language is loose, and may mean that there is no jurisdiction if he remove, or that upon objection he has no right to remove. The author cites two cases for this proposition.

R'y *vs.* Co, 50 Fed., that on motion to remand, assuming the land owner to be plaintiff, which the court doubts, removal cannot be sustained.

R'y *vs.* Day, 54 Fed., 545, holding, on the contrary, that the land owner, dissatisfied with the award, and who appeals to the State court, is a defendant for the purpose of removal, although the State law gives him the right on such appeal to the opening and closing—the issue being confined solely to the question of damages.

Appellant also cites Martin *vs.* R'y, 151 U. S., 690, which holds:

Section three of the Removal Act is formal, and though obligatory, may to a certain extent be waived. But that diverse citizenship and some other jurisdictional facts prescribed in section two are essential and cannot be waived.

As I view it, these do not establish the contention of appellant, that

There can be no waiver of a defect in jurisdiction due to it that removal is not made by the defendant as required by section two of the Removal Act. Appellant says it is unable to see any distinction between removal on the part of a nonresident plaintiff, and removal on the part of a resident defendant (Brief, 32).

That, it appears to me, ought not to be difficult.

The resident is not afraid of injustice from his own courts.
Rawle, Const., page 233.

The very basis and spirit of the act is therefore against removal by him. Non-residence and not party status is the vitals of the cases cited by appellant. The Removal Act is not a local change of venue statute. What is more controlling, if a resident, defendant could remove, he would put into the Federal court by that method what he never could place there in any other way. His removal would not set an existing jurisdiction in motion—it would create jurisdiction. This last statement is of the essence of the dispute. Counsel, in my view, utterly misapprehend the scope of section two of the act. They insist that *every* part of section two goes to jurisdiction; that if every element of removability exists, removal by a non-resident defendant is still essential and not to be waived. They do this, though they admit that section two is merely a limit upon the *class of cases* that may be removed—which logically excludes the status of the non-resident as a jurisdictional element. (Brief, 38, 35.) They overlook that parts of the section have been declared not to be jurisdictional—the provisions dealing with residence in the District.

Ry. *vs.* Lumber Co., 37 Fed. 3 (Brewer).
Fales *vs.* Ry., 32 Fed., 672.

Where a party who might invoke the original jurisdiction of the Federal court removes, the removal is not of the jurisdiction. It becomes a mere method of invoking an already existing power to act judicially.

It is now settled that a suit cannot be removed from a State court unless it could have been brought originally in the Circuit Court of the United States.

Both the Act of 1875 and that of 1877 gives the circuit courts original jurisdiction of all suits having the requested amount in dispute, and in which there was a controversy between citizens of different States. So that what was a suit

or controversy to which, by reason of diverse citizenship, the judicial power of the United States extended, must still be deemed such suit under the Act of 1877. The only effect of the latter Act, so far as the present question is concerned, was to restrict the right of removal from the State court to cases of which the circuit court could take original cognizance.

Traction Co. *vs.* Mining Co., 196 U. S., at 251.
R'y *vs.* Davidson, 157 U. S., at 208.

Ayres *vs.* Watson, cited by appellant, 113 U. S., 594 (5 Sup. Ct. Rep., 642), holds, that where the suit is civil, there is more than the required amount in controversy, and it is a controversy between citizens of different States; that *then* the parties named in the statute may remove, and that the jurisdictional part is the one which defines cases *in which* a removal may be made. That the other requirements, such as time for removal, or form, are modal, but are also essential if insisted on.

Sec. 2.

Section two permits the removal of any suit of which by section one jurisdiction is given to the Federal courts.

R'y *vs.* Lumber Co., 37 Fed., 3.
Fales *vs.* R'y, 32 Fed., 672.

Section two refers to the parts of section one by which original jurisdiction is conferred.

R'y *vs.* Davidson, 157 U. S., at 208.

To put it in other words: A rightful removal presupposes original jurisdiction to try the case removed. That exists as to a non-resident who has become a plaintiff in a State court, though he is subject to the affirmative defense of election when he reaches the Federal court. Had he not gone into the State court he could have sued originally in the Federal court. The defense of election does not go to jurisdiction. The

original jurisdiction does not exist for a resident defendant. When the resident defendant removes there is no pre-existing jurisdiction to set in motion. When the non-resident plaintiff removes, the removal is a mere means of invoking existing jurisdiction, therefore modal, and capable of being waived.

III.

If the non-resident was a plaintiff and therefore did not succeed in giving the circuit court jurisdiction by his attempt at removal, still as he had the right to bring this very suit into that very court by original suit, the court had power, on consent, to try it. Under such circumstances, the abortive removal was but an informal method for invoking the original jurisdiction of the court.

We save dispute on this head because plaintiff in error admits that Boynton might have sued originally in this circuit court. The admission is coupled with citing the Traction Company case and the Boom Company case, which so hold.

He could, had he so elected, have brought a suit in the Federal court, alleging the appropriation of his land in the condemnation proceedings, and would have had the right in such suit in said court to recover the value of his land (Brief, 43, 44).

It is practically conceded that no such point as this was mooted in Martin *vs.* Snyder, and it is the fact that it was not, even if it be assumed it was involved to be passed on (Brief, 46).

The real objections urged are election and that, to treat this removal, if abortive, as an original trial on consent,

would create a new class of cases for the circuit court (Brief, 48). It is also said (Brief, 48, 52):

> It is presumed that a case is without the jurisdiction until the contrary appears.
>
> Citing Trust Co. *vs.* Henderson, 170 U. S., 511, Brief, 48, 52.

Proceeding by elimination, it is submitted that while it is presumed that a case is without the jurisdiction, this hardly establishes a rule, that when it appears there was jurisdiction to try a cause where it was tried, it will be presumed it was there tried in a way that there was no power to try it in.

As for creating a new class of circuit court cases, the utmost that was done was to obtain trial of a case which that court always could try, by an irregular method when an objection, not made, would have stopped such trial. There is nothing new about it. It has always been the law that if a transfer be attempted to a court which may hear the cause, originally, or upon proper transfer, the transfer is so defective that there is no power to try as a transferred cause, and it is there tried without objection, it is a case of voluntary litigation on that side of the court that had jurisdiction.

A removal is surely no more jurisdictional than a transfer by appeal, yet, what we contend for has always been ruled as to appeals to a court having original jurisdiction of the matter involved in such appeal.

A justice of the peace of the State of Wisconsin, failed to render judgment on a verdict for the plaintiff returned by the jury impaneled to try the case. The defendant appealed to the county court, where both parties appeared and entered upon a trial of the cause, without any objection on the part of either that no appeal lay from the verdict of the jury; and judgment was rendered against plaintiff. Held in an action in one of the courts of Iowa, on the transcript of such judgment and proceedings, that the appearance of the parties and their going to trial on the merits, gave the appellate court jurisdiction of their persons, and rendered

its proceedings and judgment valid, it appearing that such court, under the laws of Wisconsin, would have had jurisdiction to try the cause had it been originally brought there.

Danforth *et al. vs.* Thompson, 34 Iowa, page 243.

In County *vs.* Rolls, 18 Ill., 29, it was held: Although a court not having jurisdiction can not take it by consent of parties, and its judgment is a nullity, yet if, on appeal from such court to a court having jurisdiction in the matter, the parties voluntarily appear and consent to a trial, the judgment in the latter court will be binding.

The court having original jurisdiction of the subject-matter, jurisdiction of the parties is waived by voluntarily appearing and consenting to a trial between them.

Where an appeal has been taken from a justice of the peace to the district court upon questions of law and fact, and the case there tried, and judgment entered therein without objection, the jurisdiction of the district Court is complete, even though the justice had no jurisdiction for the reason that the amount in controversy exceeds one hundred dollars.

Lee *vs.* Parrett, 25 Minn., 128.

An unauthorized appeal to the district court was taken from a judgment of a justice of the peace. The parties appeared in the district court, submitted to its jurisdiction amended their pleadings, and consented to a trial of the case on a day fixed. Held that the district court acquired jurisdiction to hear and determine the case on its merits, notwithstanding the irregular mode in which the case was brought into that court.

Wrolsen *vs.* Anderson, Minn., 55, N. W. R., 597.

It is held in Baggs *vs.* Martin, 179 U. S., 206:

While consent does not give jurisdiction, yet when a court has power to determine a particular controversy without re-

moval, one who brings the case there, cannot say, against jurisdiction, that the sole reason assigned for removing the case is not well founded.

It goes without saying, that had failure to remove effectively, in a case where there was original jurisdiction, been jurisdictional, it could make no difference who brought the case, and that bringing it could have created no estoppel to assert such want of jurisdiction.

If the act of Congress admits of a case in court being brought within the original cognizance of the Federal court, that is an end of the matter, though it be a case of the appropriation of private property to public uses under the authority of the State.

Traction Co. *vs.* Mining Co., 196 U. S., at 253-4.

Again, at pages 246, 247:

Why could not the proceeding instituted in the county court have been brought originally in the Federal Court? The case as made in the county court was beyond question a judicial proceeding. It related to property rights. The citizenship is diverse and the value more than $2,000. This meets the very language which gives to the circuit courts original cognizance concurrent with the courts of the several States. In view of these explicit provisions, it is clear that the proceeding in the county court was a suit or controversy within the Federal law. The judicial power of the United States is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case to which the Constitution extends the judicial power of the United States. A proceeding to take land by eminent domain and to determine compensation to be made is a suit at common law when initiated in a court. It is an attempt to enforce a legal right.

Traction Co. *vs.* Mining Co., 196 U. S., at 246, 247.

The circuit court, recognizing the right of the traction company to appropriate the land in question, if necessary for its purposes, could do all that is required by the Ken-

tucky statute and meet fully the ends of justice. *Besides, the court always looks to substance and not to mere forms. Mere forms are not of vital consequence in cases of condemnation.*

Kohl *vs.* U. S., 91 U. S., 367, 375.
U. S. *vs.* Jones, 109 U. S., 513, 519.
Traction Co. *vs.* Mining Co., 196 U. S., 254.

2.

On the objections on part of appellant not already fully noticed the only relevant citations deal with election.

It is said in section 65, Black's Dillon, Rem., *on motion to remand:*

The land owner who has appealed to the State court waives the right to remove, by having the record sent to the State supreme court for review by certiorari.

This was a direct attack. It but holds that one party had waived a right. Waiver is an affirmative defense. Waiver by one party may always be waived by his opponent.

It is claimed for Thurber *vs.* Miller, 14 C. C. A., 432, that a plaintiff who commences a suit in a State court cannot afterwards remove it, and that he is bound to remain in the forum of his own selection—it is not indicated whether the defense of election of remedies goes to the jurisdiction, and may or may not be waived.

Black's Dillon on Removals, section 65, states squarely that, with a single exception, the statute has limited the right of removal to the defendant and has excluded the plaintiff from the exercise of this privilege. This sounds quite formidable, but, after all, does not state whether or not he may not remove upon consent of his adversary in cases where all the elements of jurisdiction, such as civil suit, amount in controversy and diversity of citizenship exist. In other words, while the author says the right to remove is restricted to the defendant, he does not say that a plaintiff who might originally have brought the suit may not bring it in by an irregular removal, consented to by his adversary. It is sig-

nificant that this reason is given for the conclusion. "When he has chosen to begin his proceedings in the State court, he must abide by his election cannot transfer his cause to another forum." It will hardly be claimed, seriously, that a mere election of remedies may not be waived by one's opponent.

3.

There is a great volume of further citations. I am unable to see their use. Hard labor required to investigate them has only demonstrated that my labor was of no benefit to this suit. I indulge the hope that the analysis of them which follows will save the time of the court. I would gladly omit them, if that might not, by possibility, be construed into an admission that they were of value to the plaintiff in error.

Torrence *vs.* Shedd, 144 U. S., 527 (12 Sup. Ct. Rep., 726), simply holds that where there is no jurisdiction, there should be a remand to the circuit court with direction to render judgment for costs, and to remand the case to the State court.

State of Minn. *vs.* Northern Securities Co., 194 U. S., 48 (24 Sup. Ct. Rep., 598). If it does not appear from the statement of plaintiff that the case arises under the Constitution or laws of the United States, the case cannot be removed from the State court, and consent to such removal is of no avail.

Mansfield *vs.* Swan, 111 U. S., 379 (4 Sup. Ct. Rep., 510), holds that if diversity of citizenship does not appear, or the absence of it does appear, the court will dismiss on its own motion.

Stevens *vs.* Nichols, 130 U. S., 230 (9 Sup. Ct. Rep., 518). Diversity of citizenship must be made to appear affirmatively

to have existed at the commencement of the action and not simply at the time of asking for removal.

Jackson *vs.* Allen, 132 U. S., 27 (10 Sup. Ct. Rep., 9). Where the record does not sufficiently show the citizenship of the parties at the commencement of the action, and at the time of filing petition for removal, the defect cannot be cured by amendment, and the cause must be remitted, with directions to remand to the State court.

Crehore *vs.* Ry., 131 U. S., 240 (9 Sup. Ct. Rep., 692): Where it appears on appeal that the petition below does not show jurisdictional grounds for removal, there will be direction to the circuit court to remand to the State court without allowing amendment.

Graves *vs.* Corbin, 132 U. S., 571 (10 Sup. Ct. Rep., 196): Where it appears on appeal to the supreme court, from the circuit court, that the suit is one of which the latter court should not have taken jurisdiction (on question of whether controversy was wholly between citizens of different States) the supreme court will reverse the judgment and remand the cause with costs against petitioner for removal.

The question is not what the parties may be allowed to do but whether a court will affirm or reverse the judgment of the circuit court where it appears that it is a case to which the judicial power of the United States does not extend.

Scott *vs.* Sanford, 19 Howard, 393 (15 L. C. P., 691) (dissenting opinion).

A congressional enactment, that the circuit court shall not take cognizance of a suit by an assignee of a chose in action, unless the original holder could have maintained the suit, is not in conflict with the constitution.

Sheldon *vs.* Sill, 8 How., 441 (12 L. C. P., 1147).

Turner *vs.* Bank, 4 Dallas, 8 (1 L. C. P., 7): Where the endorsee of a note sues, jurisdiction is not made out by showing diversity of citizenship between him and defendant unless the record also shows that the payee and endorsee and the maker were of diversity of citizenship.

Thompson *vs.* Ry., 6 Wallace, 134 (18 L. C. P., 765): A court of equity will not make decree if it appears that there is not an absence of a plain and adequate remedy at law.
U. S. *vs.* Huckabee, 16 Wall., 414.

Fruit Co. *vs.* Henderson, 170 U. S., 511 (18 Sup. Ct. Rep., 685). If jurisdiction given a Federal court is not in terms exclusive jurisdiction, the courts of the State retain concurrent jurisdiction subject to removal in a proper case.

Hanrick *vs.* Hanrick, 153 U. S., 192 (14 Sup. Ct. Rep., 835), holds a defendant in partition, to which all the defendant and all the plaintiffs are indispensable parties, and where each and all the defendants contest rights asserted by plaintiff, and defendant was a citizen of the same State as some of the plaintiffs, cannot remove his suit from the State court upon the ground of prejudice or local influence between himself and other defendants.

U. S. *vs.* Hudson, 7 Cranch, 32 (3 L. C. P., 259). The courts of the U. S. have no common law jurisdiction in cases of libel against the government.

Gerling *vs.* Ry., 151 U. S., 673 (14 Sup. Ct. Rep., 533), simply holds that late removal may be waived and cannot be raised for the first time on writ of error.

Fisk *vs.* Hanarie, 142 U. S., 459 (12 Sup. Ct. Rep., 217), holds that, on motion to remand, late removal will remand.

Ex parte Pennsylvania, 137 U. S., 451 (11 Sup. Ct. Rep., 141) holds, simply, that change in statute has taken away the remedy of mandamus to compel the circuit court to take jurisdiction of a cause; and writ of error. Also, that a cause cannot be removed on account of prejudice or local influence unless the matter in dispute or value is more than $2,000.00.

4.

There was no need to cite cases for the proposition that there could be no estoppel to assert want of jurisdiction over the subject-matter. Fourteen are cited. I have examined them. I shall not print the result. It would have been more effective to devote this effort on part of appellant to cite cases tending to show there was want of jurisdiction. If it does not exist there is no legal estoppel. Cases there are in which a moral estoppel is created. But it is not enforceable.

All of which is respectfully submitted.

BENJ. I. SALINGER,
Attorney for C. D. Boynton.

Supreme Court of the United States.

No. 170.—October Term, 1906.

Mason City and Fort Dodge Railroad Company *vs.* C. D. Boynton.	On a Certificate from the United States Circuit Court of Appeals for the Eighth Circuit.

[February 25, 1907.]

This case comes here on the following certificate:

"The United States Circuit Court of Appeals for the Eighth Circuit, sitting at the City of St. Louis, Missouri, on the 8th day of December, A. D. 1905, certifies that the record on file in the above entitled cause, which is pending in such court upon a writ of error duly issued to review a judgment rendered in such cause in favor of the defendant in error in the Circuit Court of the United States for the Southern District of Iowa, discloses the following

"The Code of Iowa, 1897, in a chapter relating to the taking of private property for works of internal improvement, including the construction and repair of railways, contains the following:

'Sec. 1999. If the owner of any real estate necessary to be taken for either of the purposes mentioned in this chapter refuses to grant the right of way or other necessary interest in said real estate required for such purposes, or if the owner and the corporation cannot agree upon the compensation to be paid for the same, the sheriff of the county in which such real estate may be situated shall, upon written application of either party, appoint six freeholders of said county not interested in the same or a like question, who shall inspect said real estate, and assess the damages which said owner will sustain by the appropriation of his land for the use of said corporation, and make report in writing to the sheriff of said county; and, if the corporation shall, at any time before it enters upon said real estate for the purpose of constructing said railway, pay to the sheriff, for the use of the owner, the sum so assessed and returned to him as aforesaid, it may construct and maintain its railway over and across such premises.'

'Sec. 2009. Either party may appeal from such assessment to the District Court within thirty days after the assessment is made, by giving the adverse party, or, if such party is the corporation, its agent or attorney, and the sheriff notice in writing that such appeal has been taken. The sheriff shall thereupon file a certified copy of so much of the appraisement as

applies to the part appealed from, and said court shall try the same as in an action by ordinary proceedings. The land owner shall be plaintiff and the corporation defendant.

'SEC. 2010. An appeal shall not delay the prosecution of work upon said railway, if said corporation pays or deposits with the sheriff the amount assessed. The sheriff shall not pay such deposit over to the person entitled thereto after the service of notice of appeal, but shall retain the same until the determination thereof. . . .

'SEC. 2011. On the trial of the appeal no judgment shall be rendered except for costs. The amount of damages shall be ascertained and entered of record, and if no money has been paid or deposited with the sheriff the corporation shall pay the amount so ascertained, or deposit the same with the sheriff before entering upon the premises. Should the corporation decline to take the property and pay the damages awarded on final determination of the appeal, then it shall pay, in addition to the costs and damages actually suffered by the land owner, a reasonable attorney's fee, to be taxed by the court.

'SEC. 2012. If, on the trial of the appeal, the damages awarded by the commissioners are increased, the corporation shall pay or deposit with the sheriff the whole amount of damages awarded before entering on or using or controlling the premises. The sheriff, upon being furnished with a certified copy of the assessment, may remove said corporation, and all persons acting for or under it, from said premises, unless the amount of the assessment is forthwith paid or deposited with him.

'SEC. 2013. If the amount awarded by the commissioners is decreased on the trial of the appeal, the reduced amount only shall be paid the land owners.'

"Section 3497 of the Code of Iowa, 1897, also provides:

'An action may be brought against any railroad corporation, . . . in any county through which such road or line passes or is operated.'

"The Mason City and Fort Dodge Railroad Company, plaintiff in error, hereinafter called railroad company, was a railroad corporation organized and existing under the laws of the State of Iowa, and as such entitled to avail itself of the provisions of the foregoing statutes of Iowa. C. D. Boynton, defendant in error, hereinafter called the owner, was the owner of certain lots of ground in the Town of Carroll, Carroll County, in the State of Iowa, and was at all times mentioned herein a citizen of the State of Missouri. Prior to February 18, 1902, the railroad company, requiring Boynton's lots as a right of way for the construction of its railroad, filed an application in the office of the sheriff of Carroll County, asking for the appointment of six freeholders to inspect the lots and assess the damages which the owner would sustain by the appropriation of his lots for the use

of the railroad company. On February 18, 1902, the commissioners were duly appointed by the sheriff and made their report, assessing the owner's damages occasioned by the appropriation of his lots by the railroad company at $4750.00.

"On the same day the railroad company paid the sheriff that amount of money for the use of the owner.

"Afterwards, and within the time fixed by the State statute, the owner appealed from the commissioners' award to the District court of Carroll County. In due time, the owner filed in the last mentioned court a petition for the removal of the cause into the Circuit Court of the United States for the Western Division of the Southern District of Iowa, on the ground of diversity in citizenship. In his petition and bond to secure such removal the owner referred to and treated himself as the defendant, and referred to and treated the railroad company as the plaintiff, in the case.

"In due course the cause came on for hearing in the Circuit Court, when the parties, by a written stipulation filed with the clerk, waived a jury and agreed to try the case to the court. Both parties introduced evidence and fully submitted themselves to the jurisdiction of the court (if they could do so). The trial resulted in an assessment of the owner's damages at $11,445, and in a judgment against the railroad company for costs, including a fee of $300 for the owner's attorneys. In due time the railroad company regularly sued out a writ of error to the end that the record and proceedings in the Circuit Court might be reviewed by this court. The assignment of errors which accompanied the petition for the writ of error alleged that the circuit court erred in ascertaining and fixing the amount of damages to be paid by the railroad company for its appropriation of the owner's lots, in that there was an entire absence of evidence to support the award and finding. At no time during the pendency of the proceedings in the Circuit Court did the railroad company question the jurisdiction of that court or the right of the owner to remove the cause into that court, but both parties participated in the trial up to a final judgment, and in the proceeding to secure a writ of error, as if there was no question of jurisdiction in the case. Not until the railroad company filed its brief in this court was the jurisdiction of the Circuit Court in any manner challenged. But in its brief, as also in the oral argument made in its behalf, the chief point relied upon by the railroad company to secure a reversal of the finding and judgment of the Circuit Court, is that the owner was the plaintiff in said cause and proceeding, and did not have the right to remove the same into the circuit court and that therefore that court could not entertain jurisdiction thereof.

"And the Circuit Court of Appeals for the Eighth Circuit further certifies that the following questions of law are presented in this cause, that

their decision is indispensable to a decision of the cause, and that to the end that such court may properly decide the issues of law so presented it desires the instruction of the Supreme Court of the United States upon such questions, to wit:

"1. Was the land owner a defendant within the meaning of the removal statute, when the suit was removed into the Circuit Court?

"2. If the land owner was not a defendant, within the meaning of the removing statute, could the Circuit Court take cognizance of the suit through a removal by him? Stated in other words, the question is this: Is the provision of the removal statute, to the effect that the removal, on the ground of diverse citizenship, may be 'by the defendant or defendants therein, being non-residents of that State,' restrictive and jurisdictional in the sense that cognizance of the suit can be taken by the Circuit Court through a removal only when it is by the defendant, or is the provision only modal and formal in the sense that non-compliance therewith, or non-conformity thereto, may be waived?

"3. Is the judicial proceeding which the land owner is authorized by the statutes of Iowa to initiate in the District Court of the State, by way of a so-called appeal from the assessment of the commissioners selected by the sheriff, a suit which can be originally instituted in the Circuit Court of the United States, when the citizenship of the parties and the sum or value of the matter in dispute are such as to make the suit otherwise cognizable in that court?

"4. If the Circuit Court could not have taken cognizance of the suit through the removal by the land owner, and if the Circuit Court could have taken cognizance of the suit through its original institution in that court after the assessment by the commissioners, did the parties by appearing in the Circuit Court and there litigating to a final conclusion the matter in dispute, without any objection to the jurisdiction of the court or to the manner in which its jurisdiction was invoked, authorize the Circuit Court to exercise jurisdiction and to proceed to final judgment in like manner and with like effect as if the suit had been originally instituted in that court, the citizenship of the parties and the sum or value of the matter in dispute being such as to make the suit otherwise cognizable in that court?"

Mr. Justice HOLMES delivered the opinion of the Court.

In *Madisonville Traction Co.* v. *Saint Bernard Mining Co.*, 196 U. S. 239, it was decided that proceedings of this character could be removed to the United States Circuit Court. The question to be decided now is only whether the removal in this case can be upset on the ground that it was asked by the wrong party. The railroad company relies upon the words of the

Iowa Code, § 2009, quoted above, and upon a decision of the Supreme Court of the State in a case like the present, except that the railroad was a foreign company, in which it was held that the railroad had a right to remove. *Myers* v. *Chicago & Northwestern Ry. Co.*, 118 Iowa, 312, 324. See also *Kirby* v. *Chicago & Northwestern Ry. Co.*, 106 Fed. Rep.551. It is said that this Court is bound by the construction given to the State law by the State Court. Indeed the above § 2009 does not need construction; it enacts, in terms, that the land owner shall be plaintiff. As the right to remove a suit is given only to the defendants therein, being non-residents of the State, it is argued that the State decision ends the case.

But this Court must construe the Act of Congress regarding removal. And it is obvious that the word defendant as there used is directed toward more important matters than the burden of proof or the right to open and close. It is quite conceivable that a State enactment might reverse the names which for the purposes of removal this Court might think the proper ones to be applied. In condemnation proceedings the words plaintiff and defendant can be used only in an uncommon and liberal sense. The plaintiff complains of nothing. The defendant denies no past or threatened wrong. Both parties are actors: one to acquire title, the other to get as large pay as he can. It is not necessary in order to decide that the present removal was right to say that the State decision was wrong. We leave the latter question where we find it. But we are of opinion that the removal in this case was right for reasons which it will not take long to state.

It is said the proceedings only become a case, within the meaning of the Act of Congress, after the preliminary assessment and the appeal, and that then the land owner is in the position of one demanding pay for property which he has lost. If we take a general view of the Iowa statutes, this conclusion is not correct. The railroad might have taken the appeal. If it had, the land owner would have been on the defensive in endeavoring at least to uphold the assessment, but he would have been called the plaintiff none the less. Whichever party appeals, it is not true that the land owner is seeking pay for what he has lost. By § 2011 the railroad is free to decline to take the property if it thinks the price too large. Even if, as in this case, it deposits the amount first assessed with the sheriff, the latter is not to pay it over until the determination of the appeal. § 2010. We see no reason to suppose that the deposit impairs the railroad's right to withdraw, although the Supreme Court of Iowa says, *ubi supra*, that by payment and entry the railroad appropriates the land. See § 2013. Probably, too, the position of the parties under the Act of Congress should be determined upon general considerations without regard to what has happened. Looked at as a whole, the Iowa statutes provide a process by which

railroads and others may acquire land for their purposes which the owner refuses to sell. The first step is the valuation. Whether it is part of the case or not, it is a necessary condition to the proceedings in court. Against the will of the owner the title to the land is not acquired until the case is decided and the price paid. The intent of the railroad to get the land is the mainspring of the proceedings from beginning to end, and the persistence of that intent is the condition of their effect. The State is too considerate of the rights of its citizens to take from them their land in exchange for a mere right of action. The land is not lost until the owner is paid. Therefore, in a broad sense, the railroad is the plaintiff, as the institution and continuance of the proceedings depend upon its will. *Hudson River Railroad & Terminal Co.* v. *Day*, 54 Fed. Rep. 545.

It is not argued that this is any the less a suit because the railroad is free to decline to take the property. The adjudication fixes the right of the railroad to take the land at the price adjudged, and charge it with costs and attorney's fees taxed by the Court, in case it elects not to take. The question is not discussed in *Madisonville Traction Co.* v. *Saint Bernard Mining Co.*, 196 U. S. 239, where, if there had been anything in it, possibly it might have been raised.

As what we have said is sufficient to dispose of the matter of the certificate, we think it unnecessary to consider other arguments, or to answer any question but the first.

The first question is answered, Yes.

True copy.

Test:

Clerk Supreme Court, U. S.